Supreme Court, U.S.
FILED
OCT 17 2008
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(1)

No. 08-521

In The
Supreme Court of the United States

GUY ABRAMS, JAMES PIKE, JOEHONNY REESE, JAY JOHNSTONE, BARON OSTERMAN, THOMAS SLADE, LEROY BRAZILE, JAMES WAITES, JEFFREY BATTISON, THOMAS STREICHER, ROBERT WRIGHT, AND VALERIE LEMMIE,
Petitioners,

v.

BESSIE JONES, ADMINISTRATRIX OF THE ESTATE OF NATHANIEL JEFFREY JONES, BESSIE JONES, NATHANIEL JONES, JR., AND TYRIQ A. HOLLEY,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Whether the "for all purposes" mandate of Fed. R. Civ. P. 10(c) requires that federal courts accept as true the facts stated in exhibits to a complaint for purposes of evaluating a motion to dismiss.

2) Whether the rule of *Scott v. Harris*, 127 S. Ct. 1769 (2007) (requiring summary judgment reliance on incontrovertible facts established by a public record videotape) also applies to Rule 12(b)(6) motions to dismiss asserting public employees' qualified immunity defense.

3) Whether the substantive due process "malice and intent to harm" standard, rather than the "deliberate indifference" standard, governs judicial review of police officers' on-the-scene immediate reaction to a suspect's need for medical care.

LIST OF PARTIES

Petitioners: Guy Abrams, James Pike, Joehonny Reese, Jay Johnstone, Baron Osterman, Thomas Slade, Leroy Brazile, James Waites, Jeffrey Battison, Thomas Streicher, Robert Wright, and Valerie Lemmie

Respondents: Bessie Jones, Administratrix of the Estate of Nathaniel Jeffrey Jones, Bessie Jones, Nathaniel Jones, Jr., and Tyriq A. Holley

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PETITION FOR WRIT OF CERTIORARI

Petitioners Guy Abrams, James Pike, Joehonny Reese, Jay Johnstone, Baron Osterman, Thomas Slade, Leroy Brazile, James Waites, Jeffrey Battison, Thomas Streicher, Robert Wright, and Valerie Lemmie, respectfully pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit denying their entitlement to qualified immunity from suit.

OPINIONS BELOW

By Order filed October 17, 2006, the United States District Court, Southern District Ohio, Western Division, reviewed the petitioners' assertion of their entitlement to qualified immunity from suit and denied their motion to dismiss the complaint filed against them by the respondents.[1]

In an Opinion filed April 8, 2008, authored by the Hon. Louis F. Oberdorfer, Senior United States District Judge for the District of Columbia, sitting by designation, the United States Court of Appeals for the Sixth Circuit affirmed the district court's denial of their motion to dismiss.[2] By Order filed July 31, 2008, the Court of Appeals denied the petitioners' petition for rehearing en banc.[3]

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[1] App. 15a.

[2] App. 1a.

[3] App. 52a.

JURISDICTION

The jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C. §1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Rule 10 (c), Federal Rules of Civil Procedure, provides:

> Adoption by Reference; Exhibits. A statement in a pleading may be adopted by reference elsewhere in the same pleading or in any other pleading or motion. A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes.

The Fourth Amendment to the United States Constitution provides in part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .

The Fourteenth Amendment to the United States Constitution provides in part:

> . . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .

42 U.S.C. §1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

This statement of the case includes the facts established by the exhibits to the complaint.[4] On

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[4] Other corroborating public record information includes the videotape of the incident (provided to the Clerk of this Court with the cover letter), a final and binding state court judgment against the estate of Nathaniel Jeffrey Jones concluding that Jones had committed assault and battery against the responding officers (App. 54a, 57a), and the presumptively correct coroner's public autopsy report determining that Jones was under the influence of several unlawful drugs and had a serious heart condition. (App.

Sunday, November 30, 2003, about 5:00 a.m., Nathaniel Jeffrey Jones ("Jones") became ill and fell unconscious in the parking lot of a White Castle restaurant in Cincinnati, Ohio. Jones weighed 350 pounds, was powerful, and was under the influence of intoxicating levels of cocaine, phencyclidine, and methanol. A White Castle employee called 911 to summon medical assistance. Several firefighters arrived but did not treat Jones. Jones began dancing in the White Castle parking lot. The firefighters summoned the Cincinnati Police Department and described Jones as a nuisance.

Jones shouted obscenities to some people. He also shouted as part of a tirade: "We're going to tear this M.F. down." People in the area were afraid.

Jones physically attacked Officers Pike and Osterman, the first two police officers to arrive on the scene. Officer Pike repeatedly instructed Jones to put his hands behind his back, but Jones did not comply. Instead, Jones continued to fight. Jones pushed Officer Pike against a car and Officer Osterman attempted to get Jones away from Officer Pike through balance displacement. Jones and the officers fell to the ground. The officers administered PR-24 jabs and strikes in an attempt to achieve some pain compliance. Jones continued to ignore verbal commands and twice grabbed Officer Pike's PR-24. Neither mace nor pepper spray had any effect on Jones. When Jones

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22a). Notwithstanding the petitioners' assertion of their qualified immunity defense, the Sixth Circuit ignored all three incontrovertible sources of facts: the videotape, the state court judgment, and the coroner's report.

attacked the officers and they fell to the ground, Officer Osterman was momentarily on top of Jones.

Officers Reese and Johnstone then arrived in response to an "officer needs assistance" call. They tried to get pain compliance by using a PR-24 on Jones' shins. Officer Slade arrived and tried applying shin pressure with his PR-24. While Jones was resisting, Officer Slade gave Jones a one-second burst of pepper mace between the eyes but the spray had no effect. Officer Abrams arrived and tried to use his PR-24 to get Jones arms out from under him. Jones resisted continuously as the officers tried to place handcuffs on him but they were finally able to get him cuffed. None of the officers had any parts of their bodies on Jones' back area during the handcuffing process.

The police officers were exhausted and out of breath. Officer Slade said "We gotta get him rolled" and the officers rolled Jones over to his back. It was only seconds from the time the cuffing was complete to when Officer Slade noticed that Jones was not breathing and only seconds more until Jones was rolled on his side. Officer Pike detected a pulse, but he could not tell whether Jones was breathing. Jones had stomach fluid, vomit, or some other fluid in the corner of his mouth.[5] The police officers did not have an oral breathing barrier nor were they qualified to provide CPR to Jones. The supervisory officers who arrived at the scene observed other officers attending to Jones,

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[5] The complaint characterized the fluid as "froth." The complaint admitted that Jones had froth coming from his mouth and that the officers were not qualified to provide CPR to Jones. App. 94a, 105a-106a, Paragraphs 54, 85.

confirmed that the Fire Department had been contacted, and handled other on-the-scene responsibilities.

The officers asked the Fire Department to expedite back to the location. Officer Osterman went to his vehicle to get a first aid kit. Officer Reece began a sternum rub or chest compressions, and tried to unlock Jones' jaw. The Fire Department arrived while Officer Reese was administering chest compressions.

The public record videotape further establishes that when police officers arrived at the White Castle, Jones ignored commands, stepped toward the officers, and said "Who the fuck are you?" Jones repeated to the other officer "Who the fuck are you?" Jones then said: "I don't give a fuck who you are, you better get the fuck out of here." He continued to resist the officers, taunting them by saying: "I'll take all that . . . give it to me." Officers called to Jones 23 times with commands to back up, show his hands, or put his hands behind his back. The videotape demonstrates that Jones attacked the officers, tried to harm them, and resisted arrest.

A final state court judgment also concluded that Jones had committed the torts of assault and battery against Officers Pike and Osterman.[6]

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[6] App. 66a; *Pike, et al. v. Estate of Jones*, Hamilton County Court of Common Pleas Case No. A-040954, affirmed Ohio First District Court of Appeals, Case No. C-060657. This final and binding state court decision was provided to the Court of Appeals for the Sixth Circuit as an additional authority prior to oral argument.

The public record autopsy by the Hamilton County, Ohio, Coroner established that Jones' cause of death was "cardiac dysrhythmia due to physiologic stress reaction with hypoxia due to violent struggle with restraint." The autopsy report established that contributory causes of death were "obesity, hypertensive heart disease, and intoxication by cocaine and phencyclidine."[7]

REASONS FOR GRANTING THE WRIT

I. THE FEDERAL CIRCUITS HAVE ISSUED CONFLICTING INTERPRETATIONS OF RULE 10(c), FEDERAL RULES OF CIVIL PROCEDURE

Rule 10(c), Federal Rules of Civil Procedure, provides: "A copy of any written instrument which is an exhibit to a pleading is a part thereof *for all purposes*."[8] The exhibits attached by the respondents to their complaint established that the large and powerful Jones violently attacked the police officers, refused commands to comply, and physically resisted arrest. The exhibits further established that the officers sought prompt and proper medical care for Jones after he was in custody.

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[7] App. 222a; Ohio Rev. Code §313.19 provides that the coroner's findings are binding unless set aside by the Court of Common Pleas. The Supreme Court of Ohio held that the statute creates a rebuttable presumption about the manner and mode of death. *Vargo v. Travelers Ins. Co.*, 34 Ohio St.3d 2, 29, 516 N.E.2d 226, 229 (1987).

[8] Emphasis added.

Based on an unreasonably restrictive reading of a Seventh Circuit decision[9] and ignoring the contrary conclusions of other circuits, the Sixth Circuit erroneously undermined the petitioners' entitlement to qualified immunity from suit.[10] The Sixth Circuit essentially rewrote its own rule of civil procedure and disregarded the substantive truth of the assertions in exhibits attached to the complaint. Ignoring the "for all purposes" requirement in Rule 10(c), the Sixth Circuit instead concluded: "[W]e treat the exhibit as an allegation that the officers *made* the statements in the transcripts and we treat *that* allegation as true."[11] The Court of Appeals explained: "Thus, we accept as true that on June 24, 2004 Officer Pike *said* that no officer put weight on Jones's back during the handcuffing process . . . . We do not accept as true, however, that Officer Pike's statement *is* accurate or true."[12] This unduly limiting construction of Rule 10(c) conflicts with the expansive language of the rule and its broad construction by other circuits.

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[9] *N. Ind. Gun & Outdoor Shows, Inc. v. City of South Bend*, 163 F.3d 449, 454-56 (7th Cir. 1998).

[10] This Court has often expressed the important public policy reasons for providing the valuable qualified immunity defense to public employees. *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982); *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985); *Behrens v. Peltier*, 516 U.S. 299, 309 (1996); *Johnson v. Jones*, 515 U.S. 304, 311-12 (1995).

[11] App. 11a (emphasis added).

[12] *Id.* (emphasis added).

The Seventh Circuit decision overbroadly relied upon by the Sixth Circuit actually held: "It is a well-settled rule that when a written instrument contradicts allegations in the complaint to which it is attached, *the exhibit trumps the allegations.*"[13] In the Seventh Circuit case, exhibits had been attached to the complaint merely to establish that letters had been *sent*. Therefore, the Seventh Circuit restricted their use to that purpose and did not allow the letters to "trump" the allegations in the complaint. In fact, later Seventh Circuit cases held: "The fact remains that where a plaintiff attaches documents and relies upon the documents to form the basis for a claim or part of a claim, dismissal is appropriate if the document negates the claim."[14] Other Seventh Circuit decisions affirm that exhibits attached to complaints may themselves foreclose recovery by plaintiffs.[15]

In contrast, the exhibits referenced in the complaint in the case at bar, and attached to the complaint, were referenced and attached for their substantive content. The respondents repeatedly cited the exhibits as the substantive basis for their claims.[16]

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[13] 163 F.3d at 454 (emphasis added).

[14] *Thompson v. Illinois Dep't of Profl Regulation*, 300 F.3d 750, 754 (7th Cir. 2002); *Carroll v. Yates*, 362 F.3d 984 (7th Cir. 2004).

[15] *Riggins v. Walter*, 279 F.3d 422 (7th Cir. 1995); *Matter of Wade*, 969 F.2d 241, 249 (7th Cir. 1992) ("A plaintiff may plead himself out of court by attaching documents to the complaint that indicate that he or she is not entitled to judgment.").

[16] *E.g.*, App. 73a, paragraphs 37, 39, 43, 44, 47, 48, 49, 50, and *passim*.

The exhibits are statements provided by the petitioners to the City's Citizens Complaint Authority (CCA). As a condition of employment (resulting from a federal court case settlement), all City police officers and other employees are required to provide truthful and accurate information to the CCA. The exhibits were not cited by the respondents for the mere fact that the petitioners *made* the statements. Rather, they were cited by the respondents to substantively support their claims.

The Third Circuit ruled differently than the Sixth Circuit in the case at bar: "Where there is a disparity between a written instrument annexed to a pleading and an allegation in the pleading based thereon, the written instrument will control."[17] The Fourth Circuit held that a document attached to a complaint could be used "for all purposes:" "The court is not required to accept . . . allegations that contradict matters properly subject to judicial notice or by exhibit."[18] A Fifth Circuit decision also indicates that where exhibits attached to a complaint form the basis for the complaint, the exhibits trump the allegations in the complaint.[19]

The Ninth and Eleventh Circuits have relied upon exhibits to complaints to justify granting a motion to dismiss notwithstanding the contrary allegations in

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[17] *ALA, Inc. v. CCAIR, Inc.*, 29 F.3d 855, 859, n. 2 (3d Cir. 1994).

[18] *Demetry v. Lasko Prods., Inc.*, 2008 WL 2648907 (4th Cir. 2008).

[19] *Associated Builders, Inc. v. Alabama Power Co.*, 505 F.2d 97, 99-100 (5th Cir. 1974).

the complaints.[20] The D.C. Circuit emphatically noted: "Rule 10(c) requires us to hold not merely that [an exhibit] is 'a part' of the motion, but that it is a part of the motion 'for all purposes;' i.e., for every reasonably possible purpose."[21]

Rule 10(c) does not condone limiting the use of statements in written exhibits attached to a complaint to the fact of their *making* while ignoring the fact of their *substance*. There is a split between the circuits in their interpretation of the requirement of Rule 10(c) that exhibits be considered part of the complaint "for all purposes." The Sixth Circuit significantly limits its consideration of statements in exhibits in a way that other circuits do not. This Court should grant this petition for writ of certiorari to resolve that conflict.

II. WITHOUT JUSTIFICATION, THE SIXTH CIRCUIT DISREGARDED THIS COURT'S DECISION IN *SCOTT v. HARRIS* AND IGNORED THE INCONTROVERTIBLE FACTS PRESENTED IN A PUBLIC RECORD VIDEOTAPE OF THE INCIDENT

Without any expressed basis whatsoever except the superficial and unsubstantiated representation of

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[20] *Coos County Bd. of County Comm'rs v. Kempthorne*, 531 F.3d 792 (9th Cir. 2008); *Jenkins v. Fernandez*, 147 Fed. Appx. 107 (11th Cir. 2005).

[21] *Peoples Natural Gas Co. v. Fed. Power Comm'n*, 127 F.2d 153, 156 (1942).

respondents' counsel[22] that the public record videotape of the incident "captures only part of the incident and would provide a distorted view of events at issue," the lower courts refused to take notice of the uncontroverted facts contained in the public record videotape.[23]

This is the age of video. Police vehicles, among other sources, sometimes videotape what occurs in public places. The petitioners asserted their very important qualified immunity defense and submitted a public record videotape in support of that defense. The facts established in the exhibits attached to the complaint are corroborated by the videotape from one of the police vehicles arriving on the scene. That videotape was presented to the lower courts in support of the petitioners' motion to dismiss. False, lawyer-crafted allegations in a complaint should not be permitted to override the qualified immunity defense in the face of a public record videotape absolutely disproving the false allegations.

Scott v. Harris[24] was decided by this Court in 2007. This Court held: "The videotape tells quite a different story . . . . *The Court of Appeals should not have relied on such visible fiction [one party's version of events]; it should have viewed the facts in the light*

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[22] Respondents' original counsel has since been suspended from the practice of law and remains suspended.

[23] A copy of the public record videotape was provided to the Clerk of this Court.

[24] 127 S. Ct. 1769 (2007).

depicted by the videotape."[25] *Scott v. Harris* was presented to the Sixth Circuit. Nevertheless, relying solely on the superficial and unsubstantiated representation of respondents' counsel that the public record videotape "only captures part of the incident and would provide a distorted view of events at issue,"[26] first the district court and then the Sixth Circuit assumed the representation of respondents' counsel was true. Disregarding *Scott v. Harris*, the Sixth Circuit held:

> Where the evidence "captures only part of the incident and would provide a distorted view of the events at issue," as the district court concluded with respect to the video, *we do not require a court to consider the evidence* on a 12 (b)(6) motion.[27]

Petitioners' entitlement to qualified immunity from suit should not be so facilely compromised. In this case, a public record videotape captured the incident. The false lawyer-crafted allegations in the complaint are blatantly contradicted by the videotape. Based on nothing but the bare assertion of respondents' counsel, however, the district court ignored the videotape. The Sixth Circuit perpetuated that unfairness by disregarding the rule of *Scott v. Harris* that allegations should be viewed in the light depicted by the videotape.

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[25] *Id.*, 1776 (emphasis added).

[26] App. 25a, District Court Order

[27] App. 12a (emphasis added).

There are no allegations in this matter that the videotape was doctored or altered. The videotape was provided to respondents' counsel prior to the filing of the lawsuit and, in fact, had been widely transmitted in local news broadcasts. There are no material differences between a court considering incontrovertible facts established by a public record videotape on a motion to dismiss and a court considering a public record videotape on a motion for summary judgment. The qualified immunity defense entitles the petitioners to freedom from litigation, including freedom from the burden of unnecessary, time-consuming, and expensive discovery.

The City and other public entities are subject to public record disclosure. Plaintiffs have access to public record videotapes and all other public record information prior to filing suit. Plaintiffs and their lawyers should not be permitted to fabricate claims so readily to overcome public employees' entitlement to qualified immunity from suit.

This Court should grant this petition for writ of certiorari to require that the lower courts consider the incontrovertible facts established by the videotape as required by the rule of *Scott v. Harris*.

III. THE FEDERAL COURTS HAVE ISSUED INCONSISTENT RULINGS ON THE PROPER SUBSTANTIVE DUE PROCESS STANDARD FOR A CLAIM OF FAILURE TO PROVIDE IMMEDIATE MEDICAL CARE TO AN ARRESTEE AT THE SCENE OF AN ARREST

Medical care claims typically arise in circumstances where a detainee has been in the custody of a facility for an extended period of time. The custodian typically has had clear knowledge of concrete facts supporting the conclusions that the detainee had a serious medical condition and the custodian had a subjective awareness of a significant risk to the detainee if medical care was not promptly provided.

The circumstances in the case at bar are very different. Jones had physically attacked responding police officers at the scene. Those officers, and others, had to struggle mightily to secure Jones in custody. Within seconds of observing that Jones was in need of medical care, the officers requested an expedited response from the Fire Department, began chest rubs/compressions, and went to a police vehicle to secure a mouth barrier in anticipation of possible medical intervention (Jones had froth coming from his mouth). Under those circumstances, the "traditional deliberate indifference" substantive due process standard should not have been applied by the courts below to the alleged conduct of the petitioners, City of Cincinnati police officers. The Cincinnati police officers did not have adequate time or information to deliberate or to be indifferent in the constitutional sense. Nor did the officers act with malice or intent to harm the arrestee.

This Court has previously authorized application of the traditional "deliberate indifference" standard to failure to provide medical care claims only in the typical circumstances (custody in a facility for an extended period of time).[28] The Court subsequently clarified that the rationale for the traditional deliberate indifference standard "rests upon the luxury enjoyed by prison officials of having time to make unhurried judgments, upon the chance for repeated reflection, largely uncomplicated by the pulls of competing obligations. When such extended opportunities to do better are teamed with protracted failure even to care, indifference is truly shocking."[29] The very short period of time that any of the Cincinnati police officers were on the scene while Jones was in their custody does not, as a matter of law, constitute time for "unhurried judgments," "repeated reflection," "extended opportunities," or "protracted failure." Furthermore, the petitioners had "competing obligations" such as evaluating their own condition and controlling the scene.

The traditional deliberate indifference standard is an improper match to the circumstances presented by the case at bar involving only seconds at the scene. The substantive due process standard requiring proof of malice and intent to harm is the appropriate constitutional standard by which to judge the conduct of the petitioners.

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[28] *Farmer v. Brennan*, 511 U.S. 825 (1994).

[29] *County of Sacramento v. Lewis*, 523 U.S. 833, 853 (1998).

For example, the *en banc* United States Court of Appeals for the Eighth Circuit ruled that deputies responding in their vehicle to a domestic disturbance call did not have the luxury of having time to reflect and make unhurried judgments uncomplicated by competing obligations.[30] The Eighth Circuit held that "every circuit to consider the issue has applied the [*County of Sacramento*] *v. Lewis* intent-to-harm standard to 'those myriad situations involving law enforcement and government workers deployed in emergency situations.'"[31] The *en banc* Court emphasized that "responding to this type of emergency within a police officer's assigned territory does not reflect the criminal recklessness that is a prerequisite to substantive due process liability under the deliberate indifference standard. Traffic accidents of this nature are tragic but do not shock the modern-day conscience."[32] The Court further emphasized that "[n]ot all deliberately indifferent conduct is conscience shocking in the constitutional sense of the term .... [T]he conscience-shocking standard is intended to limit substantive due process liability."[33]

Time and information are the two variables that determine which substantive due process standard applies. The traditional deliberate indifference standard applies to failure to provide medical care

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[30] *Terrell, et al. v. Larson, et al.*, 396 F.3d 975, 979 (8th Cir. 2005).

[31] *Id.* at 979.

[32] *Id.* at 981.

[33] *Id.*

claims in circumstances when a detainee is held in a facility, there is clear knowledge of a serious medical condition, and there is reasonable time to deliberate. None of those circumstances existed for the Cincinnati police officers in this case. The petitioners in this case did not have adequate information and adequate time to deliberate. Under those circumstances, they can be liable for unconstitutionally failing to provide medical care only if they acted with malice and intent to harm. Seconds at the scene of the arrest of a resisting individual (the case at bar) is more like the emergency described in *Terrell, et al. v. Larson, et al.*, than like situations involving unhurried and extended time that warrant application of the traditional deliberate indifference standard.

Panels of the United States Court of Appeals for the Sixth Circuit have themselves variously applied a standard for failure to provide immediate medical care. Contrary to the Sixth Circuit panel in the case at bar, a different panel of the Sixth Circuit granted the qualified immunity defense to two public officials because the officials only had "brief exposures" with the decedent and did not have "repeated opportunities" to know that proper care was not being provided.[34] The time and knowledge available to those two officials during their eight-hour shifts far exceeded the time and knowledge available to the Cincinnati police officers during their very short time on the scene of Jones's arrest.

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[34] *Clark Murphy v. Foreback, et al.*, 439 F.3d 280 (6th Cir. 2006).

Other panels of the Sixth Circuit justifiably apply the traditional deliberate indifference standard when a pretrial detainee is held in a facility, there is clear knowledge of a serious medical condition, and there is reasonable time to deliberate.[35] In the case at bar, Jones was not held in a facility, the Cincinnati police officers did not have knowledge of his serious heart condition or level and type of intoxication and unlawful drug use, and there was insufficient time to deliberate.

The other federal circuits have also differently articulated or applied a substantive due process standard of review to claims of failure to provide immediate medical care. The United States Court of Appeals for the First Circuit justified granting qualified immunity by holding that a "should have known" failure to provide medical care claim is not a basis for liability under a "deliberate indifference theory."

The Second Circuit denied qualified immunity to the treating physician of a prisoner in a correctional facility where it was alleged that *over time* the defendant physician had "severely mismanaged" the prisoner's case, caused him "unnecessary injury and suffering, and plac[ed] him in a life-threatening

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[35] *Estate of Carter, et al. v. City of Detroit, et al.*, 408 F.3d 305 (6th Cir. 2005); *Miller v. Calhoun County, et al.*, 408 F.3d 803 (6th Cir. 2005); *Garretson v. City of Madison Heights, et al.*, 407 F.3d 789 (6th Cir. 2005); *Blackmore v. Kalamazoo County, et al.*, 390 F.3d 890 (6th Cir. 2004).

condition," and, most importantly, had "fail[ed] to examine him over *a three-day period* ...."[36]

The Third Circuit reiterated that an inadvertent failure to provide medical care does not constitute the requisite culpability.[37] The Third Circuit emphasized that the constitutional right to medical care "is one that obviously varies depending on the medical needs of the particular prisoner."[38] The requisite culpability for a constitutional deprivation depends on the totality of circumstances confronting the custodian. In the case at bar, the requisite culpability has to be malice and intent to harm because the time and information available to the Cincinnati officers was so limited.

In a case whose underlying facts are similar to the case at bar (the plaintiff resisted arrest and during a two minute struggle to remove his arms from underneath his body he suffered cuts, abrasions, and other injuries) the Fourth Circuit held that *a 14 hour delay* in providing medical care was not a constitutional deprivation.[39] In affirming the defendants' right to qualified immunity from suit, the Fourth Circuit further clarified that the nature of a failure to provide medical care claim to a detainee in

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[36] *Alsina-Ortiz, et al. v. Laboy, et al.*, 400 F.3d 77, 81 (1st Cir. 2005) (citing *Farmer v. Brennan*, 511 U.S. 825, 835-40 (1994)).

[37] *Rouse v. Plantier, et al.*, 182 F.3d 192, 197 (3d Cir. 1999).

[38] *Id.* at 199.

[39] *Martin v. Gentile, et al.*, 849 F.2d 863 (4th Cir. 1988).

custody is to avoid "cruel and unusual punishment" and that there was no evidence of any intent to punish.

The Fifth Circuit held that a prisoner's complaint stated a claim upon which relief could be granted for failure to provide medical care where the sheriff had written notice of the medical need, but "refused to provide him with the necessary treatment."[40]

The Seventh Circuit candidly stated that "[e]xactly what ["deliberate indifference"] means has not always been clear and the defendants must exhibit something the courts call 'deliberate indifference.'"[41] Affirming the ruling in favor of the prison officials, the Seventh Circuit asserted that the relevant standard required knowledge of a substantial risk of serious medical harm and knowingly disregarding that risk. The officials had not "knowingly ignored the need to control tuberculosis."[42] Similarly, the Cincinnati police officers did not knowingly ignore the risk to Jones of not receiving immediate medical care. The Seventh Circuit required intentional or criminally reckless conduct by a custodian in order to sustain an inmate's claim for failure to provide medical care.[43] With only seconds and limited information available to the Cincinnati officers, malice and intent to harm is the logical standard of review.

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[40] *Woodall v. Foti, et al.*, 648 F.2d 268, 270, 272 (5th Cir. 1981).

[41] *Forbes v. Edgar, et al.*, 112 F.3d 262, 266 (7th Cir. 1997).

[42] *Id.*

[43] *Chapman v. Keltner*, 241 F.3d 842, 845 (7th Cir. 2001).

The Eighth Circuit required that a prisoner in a state penitentiary "prove that officials knew about excessive risks to his health but disregarded them" and required that the prisoner "produce medical evidence to establish that the delay had a detrimental effect."[44] The Ninth Circuit required that government officials knew about a serious medical condition but ignored the risk to the prisoner.[45] The Ninth Circuit added in another case that a prisoner "can establish deliberate indifference by showing that officials intentionally interfered with his medical treatment."[46] The Ninth Circuit also required that the prisoner prove he was harmed by the alleged intentional interference with his medical condition. *Id.*

The Tenth Circuit held that delay in medical care "only constitutes an Eighth Amendment violation where the plaintiff can show the delay resulted in substantial harm."[47] The Tenth Circuit held, for a prisoner in the custody of a facility, that "deliberate indifference" does not require a finding of intent to harm but does require knowledge of a substantial risk of serious harm.[48]

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[44] *Gibson, et al. v. Weber, et al.*, 433 F.3d 642, 646 (8th Cir. 2006).

[45] *Lolli v. County of Orange, et al.*, 351 F.3d 410, 421 (9th Cir. 2003).

[46] *Lopez v. Smith, et al.*, 203 F.3d 1122, 1132 (9th Cir. 2000).

[47] *Mata v. Saiz, et al.*, 427 F.3d 745, 751 (10th Cir. 2005), quoting *Oxendine v. Kaplan*, 241 F.3d 1272, 1276 (10th Cir. 2001).

[48] *Mata v. Saiz, et al.*, 427 F. 3d at 752.

With words similar to the "malice and intent to harm standard," the Eleventh Circuit granted qualified immunity from suit to police officers and held: "Medical treatment violates the Eighth Amendment only when it is 'so grossly incompetent, inadequate, or excessive as to shock the conscience or to be intolerable to fundamental fairness.'"[49] A plaintiff has to show "the required subjective intent to punish."[50]

Because each federal circuit has a materially different formulation and application of the substantive due process standard applicable to failure to provide medical care claims, this Court should grant this petition for writ of certiorari. The Petitioners seek to strike a fair balance between an arrestee's right to immediate medical care on the scene, their duties as law enforcement officers in exigent circumstances, and their entitlement to qualified immunity from suit.

CONCLUSION

For the foregoing reasons, this Court should grant the police officers' petition for writ of certiorari and provide the officers their qualified immunity defense.

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[49] *Salas v. Tillman, et al.*, 2006 WL 122426, *3, 162 Fed. Appx. 918 (11th Cir. 2006).

[50] *Id.*

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 06-4528

[Filed April 4, 2008]

BESSIE JONES, Administratrix of the Estate of Nathaniel Jeffrey Jones, Deceased, et al., *Plaintiffs-Appellees,*	)
v.	)
CITY OF CINCINNATI, et al., *Defendants-Appellants.*	)

Appeal from the United States District Court for the Southern District of Ohio at Cincinnati. No. 04-00616—Susan J. Dlott, District Judge.

Argued: February 5, 2008

Decided and Filed: April 4, 2008

Before: MARTIN and SUTTON, Circuit Judges; OBERDORFER, District Judge.*

COUNSEL

ARGUED: Richard Ganulin, CITY SOLICITOR'S OFFICE FOR THE CITY OF CINCINNATI, Cincinnati, Ohio, for Appellants. Eric C. Deters, ERIC C. DETERS & ASSOCIATES, P.S.C., Independence, Kentucky, for Appellees. **ON BRIEF:** Richard Ganulin, CITY SOLICITOR'S OFFICE FOR THE CITY OF CINCINNATI, Cincinnati, Ohio, for Appellants. Eric C. Deters, ERIC C. DETERS & ASSOCIATES, P.S.C., Independence, Kentucky, for Appellees.

OPINION

OBERDORFER, District Judge. Defendants appeal the district court's partial denial of their motion to dismiss Fourth and Fourteenth Amendment claims based on 42 U.S.C. § 1983 brought against them by representatives and relatives of Nathaniel Jones, a 350-pound 41-year old African American who died after Cincinnati police officers subdued and placed him under arrest. Because the defendants are not entitled to qualified immunity on the basis of the facts alleged in the complaint, we affirm.

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* The Honorable Louis F. Oberdorfer, Senior United States District Judge for the District of Columbia, sitting by designation.

I.

Because this is an appeal from the denial of a Rule 12(b)(6) motion to dismiss, the following account accepts as true the facts alleged in the complaint – in this case, the second amended complaint. On Sunday, November 30, 2003, during the early morning, Jones was visiting friends at a White Castle restaurant in Cincinnati. He became ill and fell unconscious in the parking lot. A White Castle employee called 911 to summon medical assistance. Several firefighters, who are defendants in this suit but not a subject of this appeal, arrived and refused to treat Jones. Jones woke up and began walking and dancing; he caused no damage to any persons or property. The firefighters summoned the police and described Jones as a nuisance.

Officers James Pike and Baron Osterman arrived in response to the firefighters' summons. Shortly thereafter, the firefighters left the scene. At about, or shortly after, the time of their departure, Pike called dispatch to request a Medical Help Response Team and a supervisor with a taser. Pike and Osterman then approached Jones and tried to subdue him, even though Jones presented no danger to any property or persons. Pike and Osterman began to savagely beat Jones with their batons. Officers Guy Abrams, Joehonny Reese, and Thomas Slade arrived and began using their batons on Jones. The officers struck Jones at least 33 times, giving him no chance to comply with orders to put his hands behind his back. They continued to strike Jones while he was on his hands and knees.

Officers Pike and Slade sprayed chemical irritant in Jones's face while he was prone in handcuffs and while officers Pike, Osterman, Abrams, Reese, Slade, and Jay Johnstone used their combined weight to hold him down. Their weight restricted the movement of Jones's diaphragm and made it difficult for him to breathe. Jones struggled to twist his body under the officers in an attempt to breathe. In response, the officers pressed down on him even harder. Once they had subdued Jones, they left him face down on the ground handcuffed behind his back for a prolonged period of time. During this time, Jones stopped breathing; all the officers knew it. Reese saw Jones changing color. Johnstone, Reese, and Abrams knew that a suspect lying face down risked positional asphyxia (difficulty breathing due to one's posture or position). None of the officers provided mouth-to-mouth resuscitation or other respiratory aid. Instead, they stood there and discussed the absence of fire personnel.

Police Sergeant James Waites arrived while Jones was still lying face down. The sergeant was aware of the risks of positional asphyxia but did not order Jones rolled over or undertake to do so himself. Two other police sergeants, Jeffrey Battison and Leroy Brazile, arrived on the scene. All three sergeants noticed Jones was not breathing. None of the sergeants provided any medical aid and each knew that no other officers were providing aid. Waites did not order officers to perform mouth-to-mouth because he saw that Jones was frothing at the mouth and they had no protective mouth barrier. Instead, Battison summoned emergency medical services. The officers all knew that it was impossible to render proper medical aid while

Jones remained in handcuffs. Their failure to remove the handcuffs delayed the administration of aid and hastened Jones's death.

Finally, plaintiffs allege that the City, as well as Chief of Police Thomas Streicher and now former City Manager Valerie Lemmie as policymakers for the City, are responsible for the officers' actions because the policymakers allowed officers to use excessive force against citizens without facing discipline, failed to provide adequate training to the officers or promulgate adequate policies addressing the use of force or the dangers of positional asphyxia, failed to discipline officers whose conduct put individuals at risk of positional asphyxia, and failed to provide officers with equipment – such as mouth barriers for mouth-to-mouth resuscitation – to aid those suffering from positional asphyxia.

Jones' grandmother and administratrix of his estate and Jones' two minor sons filed a complaint in the United States District Court for the Southern District of Ohio against sixteen defendants: the City of Cincinnati, Cincinnati Chief of Police Streicher, Cincinnati Fire Chief Robert Wright, now former City Manager Lemmie, the six police officers present during the struggle with Jones (Abrams, Pike, Reese, Johnstone, Osterman, and Slade), three police sergeants who arrived at the scene after the struggle (Brazile, Waites, and Battison), and three Cincinnati firefighters (Gregory Adams, Tyrone Harrison, and Brian Otten). The complaint alleged that the defendants violated Jones's Fourth Amendment right to be free from excessive force and his Fourteenth Amendment right to adequate medical care while

detained by the state. The complaint also contained claims for relief under Ohio law for wrongful death, gross negligence, and loss of consortium.

The defendants moved to dismiss the entire complaint on the grounds that the complaint fails to state a claim, the individual defendants are entitled to qualified immunity on the constitutional claims, and all defendants are entitled to statutory immunity under Ohio law on the state law claims. Defendants appeal the district court's (1) denial of the motion to dismiss the claims against the City, Chief of Police Streicher, City Manager Lemmie, and Officers Abrams, Pike, Reese, Johnstone, Osterman, and Slade for use of excessive force and for failure to provide adequate medical care; and (2) denial of the motion to dismiss the claim against Police Sergeants Waites, Battison, and Brazile for failure to provide adequate medical care.

II.

We review de novo the district court's ruling on a motion to dismiss a claim. *Association of Cleveland Firefighters v. City of Cleveland*, 502 F.3d 545, 548 (6th Cir. 2007). A claim survives such a motion if its "[f]actual allegations [are] enough to raise a right to relief above the speculative level on the assumption that all of the complaint's allegations are true." *Bell Atl. Corp. v. Twombly*, --- U.S. ----, 127 S.Ct. 1955, 1959 (2007). "[W]hen a complaint adequately states a claim, it may not be dismissed based on a district court's assessment that the plaintiff will fail to find evidentiary support for his allegations or prove his claim to the satisfaction of the factfinder." *Id.* at 1970.

"[W]e construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff." *Directv, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007). "[W]e need not accept as true legal conclusions or unwarranted factual inferences." *Id.*

Police enjoy qualified immunity unless (1) the facts alleged show that the police violated a constitutional right; and (2) the right was clearly established. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). We analyze the plaintiffs' claims for excessive force separately from the claim that defendants failed to provide adequate medical care.

Excessive Force. "[C]laims that law enforcement officers have used excessive force – deadly or not – in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard." *Graham v. Connor*, 490 U.S. 386, 395 (1989). The complaint alleges that the six officers who subdued Jones (1) savagely beat him with batons, striking him at least 33 times without giving him a chance to comply with their orders; (2) sprayed chemical irritant in his face after they had placed him in handcuffs; and (3) used their combined weight to hold him prone on the ground after he had stopped struggling. Such use of force is not objectively reasonable, and hence a violation of Jones's Fourth Amendment rights. *See Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 901-02 (6th Cir. 2004) (noting that baton strikes "applied after the subduing of a suspect are unreasonable" and holding that lying on top of a suspect such as Jones and spraying chemical irritant

in his face when he "had stopped resisting arrest and posed no flight risk" are unreasonable). The right of an unresisting suspect to be free from baton strikes, "significant pressure on [his] back," and a dose of chemical irritants was clearly established over three years before Jones died. *See id* at 902-03. Therefore, the officers who subdued Jones are not entitled to qualified immunity on the excessive force claim.

Failure to Provide Medical Care to Detainee. "[D]eliberate indifference" to the serious medical needs of pretrial detainees normally constitutes a substantive due process violation. *Estate of Owensby v. City of Cincinnati*, 414 F.3d 596, 602 (6th Cir. 2005). "[W]hen unforeseen circumstances demand an officer's instant judgment," a heightened standard of malice and intent to harm applies. *Id.* at 603. The defendants argue that this case should be analyzed under the heightened malice standard because there was little time between taking Jones into custody and the time he stopped breathing. We disagree. The complaint alleges that the officers left Jones on the ground for a prolonged time and that they "stood there and discussed the absence of fire personnel" after they noticed Jones was not breathing. These facts are similar to those in *Owensby*, in which this Court ruled that the deliberate indifference standard was appropriate because the six minutes between taking the suspect into custody and the time medical care was provided gave the officers "time to fully consider the potential consequences of their conduct." *Id.* (internal quotation marks omitted).

"Deliberate indifference requires that the defendants knew of and disregarded a substantial risk

of serious harm to [the pretrial detainee's] health and safety." *Id.* (brackets in original, internal quotation marks omitted). The complaint alleges that each of the officers present – the six who subdued Jones and the three sergeants who arrived afterwards – knew that the handcuffed Jones was not breathing. Therefore each knew of a substantial risk of serious harm to Jones's safety while he was in their custody and disregarded that risk by failing to provide aid. The right of a suspect in custody to receive adequate medical care, even if the suspect had been fleeing and resisting before the officers placed him in custody, was clearly established almost three years before Jones's death. *Id.* Therefore, the officers who subdued Jones and the sergeants who arrived soon after are not entitled to qualified immunity on the failure to provide medical care claim.

Municipality and City Officials. The City, Chief of Police Streicher, and City Manager Lemmie are likewise not entitled to qualified immunity on the constitutional claims. A municipality is liable for a constitutional violation when execution of the municipality's policy or custom inflicts the alleged injury. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978). The official policy or custom "must be the moving force of the constitutional violation" to establish the liability of a government body. *Polk County v. Dodson*, 454 U.S. 312, 326 (1981). A municipality cannot be held liable under § 1983 absent an underlying constitutional violation by its officers. *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986). However, where a failure to train is the result of a municipality's policy or custom and results in a constitutional violation by its officers, a city can be

held liable under § 1983. *City of Canton, Ohio v. Harris*, 489 U.S. 378, 389 (1989).

The only argument the defendants make on appeal concerning liability of the City and its policymakers is that there was no underlying constitutional violation by its officers. This argument fails. We have already rejected defendants' contention that the officers should receive qualified immunity. The complaint alleges that the City's inadequate training regarding both use of force and positional asphyxia associated with such force, tolerance of officers' use of excessive force, and policies regarding use of force and medical care of suspects all, if proven, would violate the Constitution.

III.

Throughout their briefs, defendants do not directly challenge the proposition that the facts alleged in the complaint state valid constitutional claims. Rather, they state that facts not alleged in the complaint support their claim of qualified immunity. For example, defendants state that Jones attacked Officers Pike and Osterman, that officers did not "savagely beat" Jones but rather prodded him with batons to create sufficient pain to achieve compliance, and that Jones was only on his stomach for a few seconds before officers rolled him over. Brief of Defendants-Appellants at 5-8. As support for their version of the facts, defendants cite a series of exhibits attached to the complaint. These exhibits include transcripts of interviews by a Cincinnati Citizen Complaint Authority investigator with the officers who subdued Jones (Exs. 1-5, 8) and excerpts from the Citizen Complaint Authority report on the incident (Ex. 6).

Unsurprisingly, statements by the officers contain facts which, if true, cast doubt on the allegations in the complaint.

Defendants argue that because a "copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes," Fed. R. Civ. P. 10(c), all the facts stated in the exhibits to the complaint must be assumed to be true for purposes of the motion to dismiss. Even if we assume that a transcript of an interview constitutes a "written instrument," treating a transcript as part of a pleading does not mean that we assume everything the officers said in those interviews is true. Where a plaintiff attaches to the complaint a document containing unilateral statements made by a defendant, where a conflict exists between those statements and the plaintiff's allegations in the complaint, and where the attached document does not itself form the basis for the allegations, Rule 10(c) "does not require a plaintiff to adopt every word within the exhibits as true for purposes of pleading simply because the documents were attached to the complaint to support an alleged fact." *See N. Ind. Gun & Outdoor Shows, Inc. v. City of South Bend*, 163 F.3d 449, 454–56 (7th Cir. 1998). Rather, we treat the exhibit as an allegation that the officers made the statements in the transcripts and we treat that allegation as true. Thus, we accept as true that on June 24, 2004 Officer Pike said that no officer put weight on Jones's back during the handcuffing process. Joint Appendix 177. We do not accept as true, however, that Officer Pike's statement is accurate or true; this is a question of credibility and weight of the evidence that is not before a court considering a motion to dismiss.

IV.

The court did not abuse its discretion when it disregarded evidence that the defendants filed in support of their motion to dismiss, including public documents and a videotape of the incident. On a motion to dismiss, a court may accept "matters outside the pleadings," but in doing so it generally must treat the motion "as one for summary judgment under Rule 56." Fed. R. Civ. P. 12(d). A court may consider public records without converting a Rule 12(b)(6) motion into a Rule 56 motion. *Jackson v. City of Columbus*, 194 F.3d 737, 745 (6th Cir. 1999). Where the evidence "captures only part of the incident and would provide a distorted view of the events at issue," as the district court concluded with respect to the videotape, we do not require a court to consider that evidence on a 12(b)(6) motion. *See Passa v. City of Columbus*, 123 F. App'x 694, 697 (6th Cir. Feb. 16, 2005) ("[I]n order to preserve a party's right to a fair hearing, a court, on a motion to dismiss, must only take judicial notice of facts which are not subject to reasonable dispute.").

V.

For these reasons, we affirm the decision of the district court and remand the case for discovery, summary judgment, and, if necessary, a trial to resolve the disputed factual issues.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 06-4528

[Filed April 4, 2008]

BESSIE JONES, Administratrix of the Estate of Nathaniel Jeffrey Jones, Deceased, et al., Plaintiffs-Appellees,	)
v.	)
CITY OF CINCINNATI, et al., Defendants-Appellants.	)

Before: MARTIN and SUTTON, Circuit Judges; OBERDORFER, District Judge.

JUDGMENT

On Appeal from the United States District Court for the Southern District of Ohio at Cincinnati.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is AFFIRMED. IT IS FURTHER ORDERED that the case is REMANDED for further proceedings consistent with the opinion of this court.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green
Clerk

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO WESTERN DIVISION

Case No. 1:04-CV-616

[Filed October 17, 2006]

BESSIE JONES, *Administratrix of the Estate on behalf of* Nathaniel Jeffrey Jones, *et al.*,	)
Plaintiffs,	)
v.	)
CITY OF CINCINNATI, *et al.*,	)
Defendants.	)

District Judge Susan J. Dlott

ORDER GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS

This matter comes before the Court on the Defendants' Motion to Dismiss the Second Amended Complaint. (Doc. 28). For the reasons that follow, the

Court **GRANTS** in part and **DENIES** in part Defendants' Motion.

I. BACKGROUND

Nathaniel Jones died in the early morning of November 30, 2003 in the parking lot of a White Castle restaurant in Cincinnati, Ohio. Jones stopped breathing after six Cincinnati Police Officers struggled with him, handcuffed him, and left him face down on the ground. Firefighters who arrived later were unable to revive Jones. Plaintiffs, Jones' grandmother and administratrix of his estate and Jones' two minor sons, claim that Jones had not been committing any unlawful act. They allege that the officers approached Jones, beat him with their PR-24s,[1] used the combined weight of their bodies to press Jones to the ground and handcuff him, left him face down on the ground when they should have rolled him over, and did not give Jones necessary emergency medical care. Plaintiffs also claim that the firefighters, who were on the scene but left after the police arrived, contributed to Jones' death by not being present and available to provide immediate emergency medical care to Jones.

From this fatal event comes Plaintiffs' Second Amended Complaint (hereafter the "Complaint") (Doc. 25), which alleges that the six officers who struggled with Jones, the three responding firefighters, three supervisory police officers, the City of Cincinnati, the Chief of Police, the Fire Chief, and the City Manager

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[1] A PR-24 is a side-handle police baton.

(hereafter "the Defendants")[2] violated Jones' civil rights under the Fourth and Fourteenth Amendments of the United States Constitution.[3] Plaintiffs also allege that the arresting officers, responding firefighters, and city officials wrongfully caused Jones' death in violation of Ohio Rev. Code § 2125.01 and that defendant firefighters are liable for gross negligence. Plaintiffs claim loss of consortium and seek compensatory damages, punitive damages, and

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[2] The sixteen defendants in this action are the City of Cincinnati, Cincinnati Chief of Police Thomas Streicher, Jr., Cincinnati Fire Chief Robert Wright, now former City Manager Valerie Lemmie, the six police officers present during the struggle with Jones (Guy Abrams, James Pike, Joehonny Reese, Jay Johnstone, Baron Osterman, and Thomas Slade), three police sergeants who arrived at the scene after the struggle (Leroy Brazile, James Waites, and Jeffrey Battison), and three Cincinnati firefighters (Gregory Adams, Tyrone Harrison, and Brian Otten).

[3] The first claim of relief, brought against all Defendants, is expressly pursuant to 42 U.S.C. § 1983 for alleged violations of the Fourth and Fourteenth Amendments. The third claim of relief, brought against the City, Lemmie, and Streicher, asserts that these defendants have supervisory liability for the officers' wrongful conduct; that they implemented municipal policy and custom allowing officers to use excessive force against citizens; that they failed to train and/or supervise officers on the appropriate use of force; that they failed to discipline officers who use excessive force and do not provide emergency medical care to persons in the course of being apprehended; that they failed to provide necessary equipment or training to officers to allow them to provide emergency aid; and that they failed to train, supervise, and enforce policies for the fire department in responding when police use excessive force. The third claim of relief, therefore, also is a claim for violation of Jones' Fourth and Fourteenth Amendment rights.

injunctive relief. Plaintiffs seek redress against all Defendants in their individual and official capacities.

The Defendants move to dismiss Plaintiffs' Complaint in its entirety. Defendants assert that the Complaint fails to state a claim against any of them, that the individual Defendants are entitled to qualified immunity from suit on the federal claims, and that all Defendants are entitled to statutory immunity under Ohio law on the tort and statutory claims. (Doc. 28 at 1.)

While the crux of the occurrence is outlined above, the following allegations from Plaintiffs' Complaint add clarity to their claims.[4] Sometime between 3:00 and 5:30 a.m. on November 30, 2003, a White Castle employee called 911 seeking emergency medical care for Jones, who had lost consciousness in the restaurant's parking lot. City of Cincinnati firefighters arrived but "refused to evaluate treat and/or care" for Jones, who had regained consciousness and reentered the White Castle. (Doc. 25 at ¶ 30-31.) Jones then exited the White Castle "walking and

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[4] These facts are drawn from the Second Amended Complaint (Doc. 25) and its exhibits, which were attached to the First Amended Complaint (Doc. 20) and incorporated into the Second Amended Complaint by reference. Exhibits to the Complaint include excerpts of police officer interviews conducted by the Citizen's Complaint Authority regarding the November 30, 2003 incident involving Jones. The Federal Rules of Civil Procedure provide that "[a] copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes." Fed. R. Civ. P. 10(c). Accordingly, the Court will give due consideration to the officers' interview statements in summarizing the alleged facts of this case.

dancing" and "continued in a like manner in the parking lot." (*Id.* at ¶ 33.) The firefighters contacted the Cincinnati police radio by way of dispatcher and described Jones as being a nuisance.

Officers Pike and Osterman arrived first on the scene. Pike contacted dispatch and requested a Medical Help Response Team and a supervisor with a tazer. Pike and Osterman then approached Jones and "tried to subdue him." (*Id.* at ¶ 37.) According to Officers Pike and Osterman, the interaction between Jones and the officers began as conversation, and then Jones became aggressive. (Doc. 20 Ex. 1 at 2-3.) At some point, Jones hit Officer Pike and then both officers physically engaged Jones. (*Id.*; Doc. 20 Ex. 2 at 2.) Officer Pike told Jones to put his hands behind his back, but Jones did not comply. (Doc. 20 Ex. 1 at 3.) Officers Pike and Osterman began to strike Jones with their PR-24s, and the three men engaged in a "ground fight." (Doc. 20 Ex. 1 at 3.) The firefighters who had initially arrived at the White Castle in response to the 911 call left the scene after Officers Pike and Osterman began to struggle with Jones.

Officers Abrams, Slade, Reese, and Johnstone arrived at the White Castle parking lot to assist Officers Pike and Osterman. Plaintiffs allege that Abrams, Slade, and Reese began striking Jones with their PR-24s and never allowed Jones to comply with verbal commands to put his hands behind his back or to be placed in a sitting position that would allow air to enter his lungs. Officers Pike and Slade also sprayed chemical irritant in Jones' face. According to the Complaint, "the chemical irritant was sprayed in [Jones'] face while Defendant officers used the

combined force of their bodies to press undue weight on [Jones'] back restricting movement of [Jones'] diaphragm resulting in lack of air exchange in his lungs." (Doc. 25 ¶ 43.) Eventually, the officers succeeded in handcuffing Jones. Plaintiffs allege that at no time did the officers disengage or de-escalate as recommended by Cincinnati Police Department Policy 12.545.[5] Plaintiffs further allege that "Defendant Officers' savage beating and failure to allow [Jones] to submit was done with malice, ill will and intent to harm." (Doc. 25 ¶ 39.)

Plaintiffs allege that after placing Jones in handcuffs, the officers stood up and walked around to catch their breath from the prolonged struggle. Jones remained face down on the ground, lying on his stomach with his hands cuffed behind his back. The officers then rolled Jones onto his back and saw that he was not breathing. After realizing that the firefighters had left the scene, an officer recalled them to provide medical care to Jones. (Doc. 20 Ex. 1 at 5.) None of the officers gave Jones respiratory support, mouth-to-mouth, or CPR. None of the officers had

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[5] Plaintiffs claim that CPD Policy 12.545 recommends that police officers disengage or de-escalate and cite as support Exhibit 6. (Doc. 25 ¶ 39.) The exhibit does not support this statement. (Doc. 20 Ex. 6.) Exhibit 6 refers to CPD policy concerning the use of chemical irritant and does not address disengagement or de-escalation. Further, City Manager Lemmie's letter, referred to in paragraph 40 of the Complaint and attached as Exhibit 7, quotes CPD's use of force policy as follows: "Disengagement is a reasonable *option* in consideration of officer safety and the necessity to apprehend immediately. Disengagement ... *may* be an appropriate response to a situation and *should* be considered." (Doc. 20 Ex. 7 (emphasis added).)

with them a mouth barrier for use in mouth-to-mouth resuscitation. At some point after the struggle, Police Supervisors Battison, Waite, and Brazile arrived at the scene. None of the supervisors gave Jones CPR or removed Jones' handcuffs.

The firefighters returned to the White Castle parking lot. Plaintiffs allege that the officers initially refused the firefighters' request to remove Jones' handcuffs so they could administer emergency aid. Plaintiffs further allege that the officers' refusal to remove the handcuffs with knowledge of the risk that Jones was suffering from positional asphyxia and potential death as a result showed "callous and deliberate disregard for [Jones'] medical needs." (Doc. 25 ¶ 69.) According to the Complaint, "Defendant Police Officers willfully, wantonly, and callously failed to provide [Jones] with appropriate emergency medical care after inflicting injury on him and interfered with the administering of emergency care by others," showing a "deliberate indifference" to Jones' medical needs. (Doc. 25 ¶ 70.)

In support of their claim that the Defendants were aware that Jones was at high risk of death due to positional asphyxia, Plaintiffs point to two sources. First, Cincinnati Police Department ("CPD") policy 12.545 Section E states that "[o]fficers may not keep a sprayed individual in a face-down position any longer than necessary to handcuff or end the threat of harm or escape." (Doc. 25 ¶ 55.) Second, in February 2003, the CPD instructed its officers on how to avoid death in custody from positional asphyxiation and provided them with a copy of a Cincinnati Police Academy Training Bulletin titled "Sudden Custody Deaths and

Positional Asphyxia." (Doc. 25 ¶ 59; Doc. 20 Ex. 10.) The Bulletin describes a number of factors that increase the risk of positional asphyxia, including cocaine induced delirium, other drug/alcohol use, and obesity. It explains that death from positional asphyxia is precipitated by "a violent struggle" and that there is an increased risk if a struggle lasts longer than three minutes, if the suspect is on his stomach, and where officers use body weight for control directly on the suspect's back. (*Id.*) The Bulletin advises that after a struggle, an officer should "move [the individual] to a seated position. Do not leave the person prone on the ground" and "[l]ook for signs of troubled breathing." (*Id.*) The Complaint alleges that the officers were on notice that Jones was at high risk for positional asphyxia because Jones was obese and had exhibited signs of possible drug or alcohol use.

Plaintiffs allege that although the City was aware of the risks of positional asphyxia, it failed to provide adequate training to officers or to promulgate clear polices addressed at avoiding deaths due to positional asphyxia. Plaintiffs also claim the City failed to discipline officers whose conduct put individuals at risk of death or caused death due to positional asphyxia. Further, they allege that the City failed to provide officers with equipment, such as mouth barriers for use in giving mouth-to-mouth resuscitation, necessary to render basic emergency aid to individuals who suffered from positional asphyxia.

II. LEGAL STANDARD ON A RULE 12(B)(6) MOTION TO DISMISS

Rule 12(b)(6) authorizes dismissal of a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). In assessing the sufficiency of a complaint, the Court must follow "the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). This accords with the purpose of Rule 12(b)(6), which the Sixth Circuit Court of Appeals has explained "is to allow a defendant to test whether, as a matter of law, the plaintiff is entitled to legal relief even if everything alleged in the complaint is true." *Mayer v. Mylod*, 988 F.2d 635, 638 (6th Cir. 1993). In addition to the allegations in the complaint, the court may consider other materials that are integral to the complaint, are public records, or are otherwise appropriate for the taking of judicial notice. *Wyser-Pratte Management Co., Inc. v. Telxon Corp.*, 413 F.3d 553, 560 (6th Cir. 2005) (*citing Bovee v. Coopers & Lybrand C.P.A.*, 272 F.3d 356, 360-61 (6th Cir.2001)).

The defendant, as the movant, bears the burden of demonstrating that the plaintiff has failed to state a claim. *See Bangura v. Hansen*, 434 F.3d 487, 498 (6th Cir. 2006). Therefore, "[o]n a Fed.R.Civ.P. 12(b)(6) motion, all of the allegations contained in the plaintiff's complaint are accepted as true, and the complaint is construed liberally in favor of the party opposing the motion." *Miller v. Currie*, 50 F.3d 373, 377 (6th Cir. 1995). At the same time, however, the

Court "need not accept as true legal conclusions or unwarranted factual inferences." *Morgan v. Church's Fried Chicken*, 829 F.2d 10, 12 (6th Cir. 1987). Nor is the Court required to accept as true complaint allegations that are contradicted by public records and other evidentiary materials of which the Court may take judicial notice. *See Veney v. Wyche*, 293 F.3d 726, 730 (4th Cir. 2002); *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988, *amended upon denial of reh'g*, 275 F.3d 1187 (9th Cir. 2001); *VTech Holdings, Ltd. v. Pricewaterhouse Coopers, LLP*, 348 F. Supp. 2d 255, 263 (S.D.N.Y. 2004). Finally, the Court must scrutinize with "special care" a motion to dismiss a complaint filed under a civil rights statute. *See Perry v. McGinnis*, 209 F.3d 597, 603 (6th Cir. 2000).

Defendants filed certain public record documents and a public record videotape of the incident, recorded by an officer's motor vehicle recorder, as exhibits in support of their Motion to Dismiss. (*See* Doc. 13 (Motion to Dismiss Original Complaint) Ex. A-B; Doc. 14; Doc. 28 Ex. A.) As a general rule, the Court may not consider matters outside the pleading when deciding a Rule 12(b) motion. *See* Fed. R. Civ. P. 12(b). The Court's decision whether to consider public records in ruling on a Rule 12(b)(6) motion is discretionary. While Defendants are correct that the Court may take judicial notice of public records without converting the motion to dismiss into a motion for summary judgment, the Court declines to exercise its discretion to consider these matters outside the pleading in ruling on this motion. *Accord Marx v. Janke*, No. 1:02cv050, Order on Motion to Dismiss (S.D. Ohio Sept. 2, 2004) (declining to consider videotapes containing an incomplete recording of

protest events in deciding a motion to dismiss). A court may take judicial notice of adjudicative facts that are "not subject to reasonable dispute in that [they are] ... capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201. With respect to the videotape in particular, Plaintiffs argue that it captures only part of the incident and would provide a distorted view of events at issue. (Doc. 30 at 4-5.) Thus, while the video may accurately reflect a portion of the incident, a reasonable dispute may still exist as to the entirety of the events alleged in the Complaint. Furthermore, the Court has culled an understanding of that morning's events from the police interview transcripts that were attached as exhibits to the Complaint. Accordingly, the Court concludes that it is able to properly review the motion to dismiss, and honor the principles underlying the qualified immunity defense, by taking into consideration only the allegations of the Complaint and the exhibits attached thereto.

III. ANALYSIS

A. Plaintiffs' Claims Under 42 U.S.C. § 1983 and Qualified Immunity

Section 1983 is not itself a source of substantive rights but provides "a method for vindicating federal rights elsewhere conferred." *Graham v. Connor*, 490 U.S. 386, 393-94. Thus, to establish a claim under § 1983, a plaintiff must "identify a right secured by the United States Constitution and deprivation of that right by a person acting under color of state law." *Russo v. City of Cincinnati*, 953 F.2d 1036, 1042 (6th

Cir. 1992). Plaintiffs have done so here, claiming that all Defendants, under color of state law, deprived Jones of rights, privileges, and amenities secured by the United States Constitution, including, inter alia, the Fourth Amendment right to be free from excessive force and the Fourteenth Amendment right of a pretrial detainee to adequate medical care. While § 1983 permits recovery against public officials who violate an individual's civil rights, these officials are often entitled to qualified immunity from individual liability for damages. Defendants argue that such is the case here and that all individual Defendants are immune from suit.

Whether a government official exercising a discretionary function is entitled to qualified immunity depends on the objective reasonableness of the official's action. An official will be entitled to immunity unless his or her action violated a "clearly established" federal right which would have been known to a reasonable person. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). If a plaintiff's allegations fail to state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery. *Mitchell v. Forsyth*, 472 U.S. 511 (1985).

Courts apply a two-step analysis in determining whether a public official facing liability for civil damages is immune from suit. *Dickerson v. McClellan*, 101 F.3d 1151, 1157-58 (6th Cir. 1996). First, the court must determine whether the defendant violated a clearly established constitutional right. "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is

doing violates that right." *Russo*, 953 F.2d at 1042. Second, the court must determine whether the plaintiff has alleged sufficient facts supported by sufficient evidence to indicate what the officer allegedly did was objectively unreasonable in light of the clearly established constitutional rights. *Dickerson*, 101 F.3d at 1158.

1. Fourth Amendment Right to be Free From Excessive Force

The Supreme Court has interpreted the Fourth Amendment, which guarantees citizens the right "to be secure in their persons ... against unreasonable seizures," as providing the right to be free from excessive force. *Graham v. Connor*, 490 U.S. 386 (1989). Courts must therefore analyze claims that law enforcement officers have used excessive force in the course of an arrest using the Fourth Amendment's "reasonableness" standard. *Id.* at 395. The reasonableness test is not capable of mechanical application but requires careful application of the facts of the case, including "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.* at 396. In other words, a court must "ask whether the officer's actions, in light of the totality of the circumstances, were objectively reasonable." *Kostrzewa v. City of Troy*, 247 F.3d 633, 639 (6th Cir. 2001) (reversing the district court's ruling that granted defendants' motion to dismiss, finding that the complaint stated a legally sufficient claim of excessive force and that the officers were not entitled to qualified immunity).

Because the amount of force that is reasonable in a seizure depends on a variety of circumstances, and because those circumstances may change throughout the course of a seizure, the Sixth Circuit analyzes excessive force claims in segments. *See, e.g., Dickerson v. McClellan*, 101 F.3d 1151, 1161 (6th Cir. 1996). The analysis involves consideration of the reasonableness of "seizure" alone, not whether it was reasonable for the police to create the circumstances that lead up to the seizure. *Id.*; *see also Cole v. Bone*, 993 F.2d 1328, 1333 (8th Cir. 1993) (scrutinizing only the seizure itself, not the events leading to the seizure, for reasonableness under the Fourth Amendment because the "Fourth Amendment prohibits unreasonable seizures, not unreasonable conduct in general.")

a. The Police Officers

Looking to the factors mentioned by the Supreme Court in favor of a greater use of force, and considering the allegations of the Complaint and the exhibits attached thereto, the Court concludes that Plaintiffs have sufficiently stated a claim that the six officers who apprehended Jones used excessive force against him. The firefighters called police to the scene because they perceived Jones was creating a nuisance. A nuisance is not the type of crime that permits officers to use a greater use of force. However, that Jones apparently then hit one of the officers reflects the commission of a more serious crime and likewise indicates that Jones posed an immediate threat to the officer's safety. This factor weighs in favor of a greater use of force. Defendants characterize Jones' actions as resisting arrest. Plaintiffs, on the other hand, allege that Jones was never given an opportunity to submit

to arrest and that he was trying to ward off the officers' blows and to maneuver his body from underneath the officers so he could breathe. If, in fact, Jones was not resisting arrest but was trying to position himself so that he could breathe, the third factor of the analysis does not weigh in favor of a greater use of force.

In determining the reasonableness of an officer's use of force, the Court must view the circumstances "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Dickerson v. McClellan*, 101 F.3d 1151, 1162 (6th Cir. 1996). However, a Rule 12 dismissal is proper only when it appears beyond doubt that a plaintiff can prove no set of facts in support of his claims, and a court must accept a plaintiff's allegations as true unless plainly contradicted by public records and other evidentiary materials of which the court may take judicial notice. While the Defendants have cast doubt on Plaintiffs' excessive force claim, the Court cannot say they have met their burden of demonstrating that Plaintiffs can prove no set of facts in support of their claim that the officers violated Jones' Fourth Amendment right. The Court concludes that the Complaint properly states a § 1983 claim against the six officers who struggled with Jones the morning of his death.

Neither are these officers entitled to qualified immunity on the claim. The right to be free from excessive force is a clearly established right for purposes of the qualified immunity analysis. *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 902 (6th Cir. 2004). This circuit has specifically held that

various types of force applied after a suspect has been subdued are unreasonable and a violation of a clearly established right. *Id.* (citing *Phelps v. Coy*, 286 F.3d 295 (6th Cir. 2002), *McDowell v. Rogers*, 863 F.2d 1302 (6th Cir. 1988), *Lewis v. Downs*, 774 F.2d 711 (6th Cir. 1985)). Specifically, an officer's use of pepper spray against an individual after he was secured and no longer posing a threat is an excessive use of force. *Id.* at 902-903 (*citing Adams v. Metiva*, 31 F.3d 375 (6th Cir. 1994)). Plaintiffs in this case specifically allege that Officer Slade "sprayed [Jones] after confirming that Officer Pike had already deployed chemical irritant and after [Jones] was prone and multiple sets of handcuffs were being placed on his wrists." (Doc. 25 ¶ 43.) The Sixth Circuit also has recognized that putting significant pressure on a suspect's back while that suspect is in a face-down position after being subdued or incapacitated constitutes excessive force. *Id.* at 903. Plaintiffs specifically allege that after Jones was face down and was being handcuffed, "[t]he chemical irritant was sprayed in [Jones'] face while Defendant officers used the combined force of their bodies to press undue weight on [Jones'] back." (Doc. 25 ¶ 43.) The Complaint additionally alleges that the officers were instructed on the risk factors linked to death in custody by positional asphyxia and knew they were supposed to immediately roll Jones over after handcuffing him.

Given Sixth Circuit precedent, Plaintiffs have alleged facts sufficient to indicate that the officers may have acted unreasonably in their use of force against Jones. The officers are not entitled to qualified immunity because a reasonable officer in the situation might have known that engaging in the alleged acts

violated Jones' right to be free from excessive force. Defendant's Motion to Dismiss Plaintiffs' first claim against the officers is DENIED.

b. The Firefighters

Plaintiffs bring their § 1983 claim against the Defendant firefighters as well. Plaintiffs' Complaint fails to state a claim against the responding firefighters under the Fourth Amendment. The protection of the Fourth Amendment is to be secure against unreasonable seizures. The Complaint directly refutes any notion that the firefighters took part in any seizure of Jones' person. It specifically alleges that the firefighters left the scene after the police officers arrived. Accordingly, the firefighters did not take part in Jones' seizure. The Court therefore GRANTS Defendants' motion as to the first cause of action stating a Fourth Amendment claim against the firefighters and Fire Chief Wright.[6]

c. The Police Supervisors

Plaintiffs' Complaint likewise fails to state a claim against the three supervisory police officers under the Fourth Amendment. A supervisory official's failure to supervise, control, or train an offending individual is not actionable unless the supervisor "either encouraged the specific incident of misconduct or in some other way directly participated in it. At a

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[6] A municipality cannot be held liable under § 1983 absent an underlying constitutional violation by its officers. *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986).

minimum, a plaintiff must show that the official at least implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct of the offending officers." *Hays v. Jefferson County*, 668 F.2d 869, 874 (6th Cir. 1982). Thus, a supervisory officer who is merely present at the scene of a search or arrest is not subject to liability, but an officer who participates at the scene may be liable for a constitutional violation that occurred during the search or arrest. *See Hall v. Shipley*, 932 F.2d 1147, 1154 (6th Cir. 1991) (*quoting Ghandi v. Police Dept. of the City of Detroit*, 747 F.2d 338, 352 (6th Cir. 1984)); *see also Otero v. Wood*, 316 F.Supp.2d 612, 623-24 (S.D. Ohio 2004) (holding that supervisory officers directly participated in the alleged constitutional violation that occurred when another officer fired a "knee knocker" round at plaintiff because the officers were present in the immediate vicinity and were arguably deliberately indifferent to plaintiff's need).

The Complaint and its attachments illustrate that the three Defendant Police Sergeants did not arrive at the scene until after the struggle took place between the six police officers and Jones. Like the firefighters, because the police supervisors were not even present at the time of the allegedly unlawful seizure of Jones, the Complaint fails to state a Fourth Amendment claim against them. Thus, the Defendants' motion to dismiss is GRANTED as to the first cause of action stating a Fourth Amendment claim against the three supervisory police officers.

d. Municipality/City Officials

Plaintiffs allege that Jones' death was the direct result of the City's unwritten custom and/or policy of allowing their officers to abandon the written City policies at the unilateral discretion of the officers and firefighters. As a result, Plaintiffs allege, the City is the "moving force" behind the officers' beating and killing of Jones. A municipality cannot be held liable under § 1983 absent an underlying constitutional violation by its officers. *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986). Because Plaintiffs have sufficiently stated a § 1983 claim against the Defendant police officers, and because they allege that the City has a policy that was the moving force behind the allegedly unconstitutional conduct, the Court finds that Plaintiffs have sufficiently stated a § 1983 claim against the City and the police department policymakers Streicher and Lemmie.

The doctrine of respondeat superior is inapplicable to §1983 actions. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691-94 (1978). A municipality can be held liable for a constitutional violation only when execution of the municipality's policy or custom inflicts the alleged injury. *Id.* at 394. The official policy or custom "must be the moving force of the constitutional violation in order to establish the liability of a government body under § 1983." *Polk County v. Dodson*, 454 U.S. 312, 326 (1981). Additionally, a municipality may ratify the acts of its employees–and thus subject itself to § 1983 liability–if it fails to meaningfully investigate alleged constitutional violations. *See Otero*, 316 F.Supp.2d at 627-28 (holding that "evidence that a municipality

inadequately investigated an alleged constitutional violation can be seen as evidence of a policy that would condone the conduct at issue").

Plaintiffs allege, inter alia:

- "[A] continuing and pervasive pattern of civil rights abuses by the City of Cincinnati police officers against persons who live within the City." (Doc. 25 ¶ at 5.)

- "[T]he deliberate indifference of the City in failing to adequately train, supervise and discipline police officers." (*Id.*)

- "[A] continuing pattern of civil rights abuses ... that results from the Defendant City's deliberate conduct in establishing policy and custom that encourages and acquiesces in Fourth and Fourteenth Amendment rights violations." (*Id.* at ¶ 18.)

- "Defendants' ... failure to stand ready to provide emergency medical care when faced with substantial likelihood of injuries, were the direct result of the City's unwritten custom and/or policy of allowing their officers to abandon the written City policies at [their] unilateral discretion .... As a result of Defendant City's 'unwritten' policies and customs, deliberate indifference, and deliberate conduct as described above, the City is the 'moving force' behind [Defendant Officers'] act of beating and killing Mr. Jones." (*Id.* at ¶ 22.)

- "[P]olicies, practices and customs of these Defendants, that allowed Officers to use excessive force against citizens, and to subject persons to outrageous, unreasonable and inhuman treatment that leads to serious injury and death." (*Id.* at ¶ 78.)

- "Defendants Streicher, Lemmie and the City of Cincinnati failed to discipline any of the Officers who aggressively approached [Jones] instead of awaiting [Mental Health Response Team] or a supervisor.... Their refusal to discipline the Officers effectively acted to ratify the conduct, and further evidences the existence of pre-existing policy and custom of allowing Officers to engage in such conduct." (*Id.* at ¶ 82.)

This Court has previously held that similar allegations are specific enough to satisfy the notice pleading requirement. *See Marx v. Janke,* No. 1:02cv050, Order on Motion to Dismiss (S.D. Ohio Sept. 2, 2004). Accordingly, Plaintiffs' allegations that the City had an official policy or custom that was the moving force behind the alleged violation of Jones' constitutional rights are sufficient to survive Defendants' motion. The Court DENIES Defendants' Motion to Dismiss as to Plaintiffs' Fourth Amendment Claim against the City, Lemmie, and Streicher.

2. Fourteenth Amendment Right to Adequate Medical Treatment

The Fourteenth Amendment guarantees protection to individuals against arbitrary action of the government. "[O]nly the most egregious official

conduct can be said to be 'arbitrary in the constitutional sense.'" *Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) (*citing Collins v. Harker Heights*, 503 U.S. at 129). The cognizable level of executive abuse of power is that which "shocks the conscious." *Id.* The United States Supreme Court has held that "deliberate indifference" to the serious medical needs of pretrial detainees is sufficiently shocking to constitute a substantive due process violation. *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983); *see also Estelle v. Gamble*, 429 U.S. 97, 104 (1976). The deliberate indifference standard requires that the defendants knew of and disregarded a substantial risk of serious harm to a detainee's health and safety. *Farmer v. Brennan*, 511 U.S. 825, 835-37 (1994).

The parties disagree as to whether "deliberate indifference" is the appropriate standard in this case. Jones argues that it is, citing, for example, *Massachusetts General* and *Lewis*. Defendants, on the other hand, argue that the "deliberate indifference" standard is not applicable in this case because it applies only in situations where the defendant has adequate time to deliberate over whether the detainee required medical care. Rather, Defendants contend that Plaintiffs must plead that the officers acted maliciously and with the intent to cause harm, a heightened standard applicable to noncustodial situations. The Supreme Court's discussion in *Lewis* is illustrative.

In *Lewis*, the parents of a motorcycle passenger killed in a high-speed police chase of the motorcyclist brought a § 1983 claim against the county, the sheriff's department, and the deputy alleging deprivation of the

passenger's substantive due process right to life. The Court described that a government official's allegedly unconstitutional action will fall somewhere along a spectrum of culpability:

> [L]iability for negligently inflicted harm is categorically beneath the threshold of constitutional due process.... It is, on the contrary, behavior and the other end of the culpability spectrum that would most probably support a substantive due process claim; conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level.... "Historically, this guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property."... Whether the point of the conscience shocking is reached when injuries are produced with culpability falling within the middle range, following from something more than negligence but "less than intentional conduct..." is a matter for closer calls.

Lewis, 523 U.S. at 849 (internal citations omitted). Thus, whether conduct falling between negligence and intent to injure meets the "shocks the conscious" standard depends on the circumstances in each case. The Court confirmed that "deliberate indifference," which falls somewhere in the middle of the culpability spectrum, satisfies the fault requirement for due process claims based on the medical needs of someone jailed while awaiting trial (*citing Mass. Gen. Hosp*, 463 U.S. 239). The Court also emphasized that the rules

of due process are not subject to mechanical application and that "deliberate indifference that shocks in one environment may not be so patently egregious in another." *Id.* at 850. However, the Court noted that the deliberate indifference standard "is sensibly employed only when actual deliberation is practical" (*id.* at 851), and that "liability for deliberate indifference to inmate welfare rests upon the luxury enjoyed by prison officials of having time to make unhurried judgments, upon the chance for repeated reflection, largely uncomplicated by the pulls of competing obligations" (*id.* at 853). Ultimately, the Court held that "a purpose to cause harm" is the requisite level of culpability to give rise to due process liability in a high-speed chase, the same level of culpability required for Eight Amendment liability in prison riot case. *Id.* at 854.

Case law leads the Court to conclude that the Sixth Circuit Court of Appeals would likely apply the "deliberate indifference" standard in this case. *See Owensby v. City of Cincinnati*, 414 F.3d 596 (6th Cir. 2005); *Watkins v. City of Battle Creek*, 273 F.3d 682, 685-86 (6th Cir. 2001) (applying the "deliberate indifference" standard to arresting officers in a § 1983 action brought by the estate of a man who died approximately three hours after his arrest as a result of eating drugs); *Sowards v. City of Trenton*, No. 03-2036, 125 Fed. Appx. 31, *39 (6th Cir. Feb. 24, 2005) (applying the deliberate indifference standard to the conduct of police officers who decided to delay medical treatment to an injured suspect after the apartment building had been evacuated). In *Owensby*, the court held that "deliberate indifference" was the proper level of culpability required to establish a

violation of an apprehended suspect's constitutional right to medical care. The police had beaten Owensby with their batons, placed him in handcuffs, and maced him. They then placed him in a police cruiser, where he stopped breathing. The court concluded that deliberate indifference was the appropriate level of culpability because the officers were capable of actual deliberation in the six minutes between the time Owensby was taken into custody and the time medical care was provided. *Id.* at 602.

The "key variable" in determining the appropriate level of culpability is "whether actual deliberation is practical, not whether the claimant is in state custody.... Custodial settings ... are not the only situations in which officials may have a reasonable opportunity to deliberate." *Ewolski v. City of Brunswick*, 287 F.3d 492, 511 at n. 5 (6th Cir. 2002). Plaintiffs have alleged that the Defendant Officers had time to deliberate whether to turn Jones over after the struggle and then whether to give him emergency medical care. Accordingly, Plaintiffs have alleged acts on the part of the Defendants that fall within the requisite culpability standard to state a claim for a violation of Jones' Fourteenth Amendment rights.

a. The Police Officers

Plaintiffs allege that after struggling with Jones and leaving him face down in handcuffs, the Defendant Police Officers did not check to see if Jones was breathing. They allege that when the officers rolled Jones over and discovered he was not breathing, they did not provide him with any respiratory support, mouth-to-mouth, or CPR. They further allege that the

officers did not immediately remove Jones' handcuffs so that the firefighters could quickly give Jones emergency medical care. Neither did the three police supervisors to arrive on the scene attempt to provide medical aid to Jones, nor did they order any officer to do so. Plaintiffs claim that these actions and inactions violated Jones' right under the Fourteenth Amendment Due Process Clause to obtain medical care for serious medical needs. These facts, together with Plaintiffs' allegations that the officers "willfully, wantonly, and callously failed to provide [Jones] with appropriate emergency medical care" and "showed deliberate indifference to [Jones'] medical needs" (Doc 25 ¶ 70), state a claim against the police officers for violation of Jones' Fourteenth Amendment rights.

The Court likewise concludes that the Defendant officers are not entitled to qualified immunity. Defendants argue that the officers should be immune from the Fourteenth Amendment claim against them because "[i]n November 2003, the contours of a fleeing and resisting suspect's right to immediate medical care was not clearly established in a particularized sense." (Doc. 28 at 11). The Court disagrees. First, Jones was not fleeing, and there is a reasonable dispute as to whether and at what point he was resisting arrest. Thus, whether precedent established the right of a fleeing and resisting suspect's right to immediate medical care is irrelevant. Second, the determination of whether Jones, as a pretrial detainee, had a right to immediate medical care was "clearly established" by virtue of *Revere v. Massachusetts General Hospital*, 463 U.S. 239 (1983). Jones was in the custody of the police at the time he required immediate medical attention. That he was not a prison inmate does not

nullify his right to care, as "it need not be the case that the very action in question has previously been held unlawful." *Russo v. City of Cincinnati*, 953 F.2d 1036, 1042 (6th Cir. 1992). Rather, "in the light of preexisting law the unlawfulness must be apparent." *Id.* The Court DENIES the motion to dismiss Plaintiffs' § 1983 claim alleging that the six officers violated Jones' Fourteenth Amendment rights.

b. The Firefighters

Plaintiffs allege that the Defendant firefighters refused to evaluate and treat Jones when they first arrived at the White Castle restaurant in response to the 911 call. Jones was conscious at that time and was in the parking lot "walking and dancing." Plaintiffs further allege that the Defendant firefighters "began to watch [the police] beating [Jones] and, with knowledge of risk and foreseeable injury to [Jones] caused by the severe beating with a PR-24, left the scene of the incident." (Doc. 25 ¶ 57.)

The Sixth Circuit Court of Appeals has held that an official can be found liable under § 1983 for denying a prisoner humane conditions if that official "knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Taylor v. Franklin County*, No. 02-6470, 2004 WL 1595203 at **5 (6th Cir. July 14, 2004) (*citing Farmer v. Brennan*, 511 U.S. 825, 837 (1994)). The Complaint thus states components of a § 1983 violation claim against the firefighers.

However, referring again to the qualified immunity analysis employed by the Sixth Circuit, the Court finds that the Defendant firefighters are entitled to qualified immunity on the § 1983 claim against them. *See Dickerson v. McClellan*, 101 F.3d 1151, 1157-58 (6th Cir. 1996). Plaintiffs have failed to demonstrate that the Defendant firefighters violated a clearly established constitutional right. While Jones' right to medical care after being injured by the police officers was clearly established, Plaintiffs have failed to guide this Court to precedent that clearly establishes an individual's constitutional right to have firefighters remain on the scene during the course of an arrest. At the time Jones' medical need arose, the firefighters simply were not present. Neither did Jones have a constitutional right to medical care before he was detained by the police. Thus, that the firefighters did not initially treat Jones when they arrived at the White Castle restaurant does not state a claim under § 1983. Accordingly, Defendant's Motion to Dismiss is GRANTED as to Plaintiffs' § 1983 claim against the firefighters for violation of Jones' Fourteenth Amendment rights in grounds of qualified immunity.

c. The Police Supervisors

The Complaint alleges that Defendants Battison, Waite, and Brazile, police sergeants with supervisory responsibility for the officers on the scene, violated Jones' Fourteenth Amendment right to care for a serious medical condition. It alleges that these officers arrived at the scene and were aware that Jones was not breathing and that his handcuffs should be removed, but none of them rendered aid or removed the handcuffs, nor did they order any officer to do so.

Supervisory liability would attach for the acts of the officers if the sergeants "did more than play a passive role in the alleged violation or showed mere tacit approval of the goings on." *Bass v. Robinson*, 167 F.3d 1041, 1048 (6th Cir. 1999) (*citing Leach v. Shelby County Sheriff*, 891 F.2d 1241, 1246 (1989)). Supervisory liability requires more than a showing of negligence. *Id.* Because the Complaint alleges that these officers were present and participated in the deprivation of medical to Jones, and for the same reasons that the officers are not immune from suit, the Court DENIES Defendants' motion to dismiss the § 1983 claim against the supervisory officers.

d. Municipality/City Officials

Plaintiffs allege that the City's inadequate training and policies and practices directly caused Jones' death. Specifically, Plaintiffs claim that the City was aware of the risks of positional asphyxia but failed to provide adequate training to officers, train them in CPR, provide them with standard emergency medical equipment such as mouth barriers, or promulgate clear policies addressed at avoiding such deaths. Plaintiffs additionally claim that the City, Lemmie, and Streicher failed to discipline officers who did not provide medical care to persons injured in the course of being apprehended and failed to properly train, supervise, and enforce policies for the fire department in responding when police officers use excessive force.

The Supreme Court has acknowledged that an allegation of "failure to train" can be the basis for municipal liability under § 1983. *City of Canton v. Harris* 489 U.S. 378, 387 (1989). However,

"inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to *deliberate indifference* to the rights of persons with whom the police come into contact." *Id.* at 388 (emphasis added). A policymaker's deliberate indifference can be inferred when "the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights." *Id.* at 390. Thus, "[i]n resolving the issue of a city's liability, the focus must be on adequacy of the training program in relation to the tasks the particular officers must perform," and "the identified deficiency in a city's training program must be closely related to the ultimate injury." *Id.* at 390-91.

The Court incorporates its discussion of municipal liability set forth in Section III.A.1. herein. Furthermore, the Complaint specifically alleges that the City's failure to train the officers in emergency medical care–particularly in light of its awareness of the possibility of death due to positional asphyxia following a violent struggle–constituted a custom and/or policy that was the "moving force" behind the alleged constitutional violation. The Complaint also alleges that this policy resulted in Jones' death. Accordingly, the Court DENIES Defendants' Motion to Dismiss as to Plaintiffs' Fourteenth Amendment Claim against the City, Lemmie, and Streicher.

To summarize, Plaintiffs' § 1983 claim remains as to the Police Officers (for the alleged Fourth and Fourteenth Amendment violations), the Police Supervisors (for the alleged Fourteenth Amendment violation), the City, Chief of Police Streicher, and City Manager Lemmie (for the alleged Fourth and

Fourteenth Amendment violations). The Defendants' Motion to Dismiss is GRANTED as to the § 1983 claim against the Firefighters and Fire Chief Wright.

B. Plaintiff's Claims Under Ohio Law

Plaintiffs bring five claims under Ohio law: wrongful death pursuant to Ohio Rev. Code § 2125.01, assault, battery, gross negligence, and loss of consortium.[7] Defendants argue that all defendants are entitled to statutory immunity against these claims pursuant to § 2744.03 of the Ohio Revised Code, which provides limited immunity to political subdivisions and their employees so long as the employees did not act "with malicious purpose, in bad faith, or in a wanton or reckless manner."[8] Ohio Rev. Code § 2744.03. Plaintiffs argue that the claims should stand as the Complaint makes allegations that support a finding of

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[7] In the Preliminary Statement of their Complaint, Plaintiffs state that this is an action seeking damages for "assault, battery, wrongful death, and gross negligence." (Doc. 25 at 5.) However, Plaintiffs do not designate assault or battery as claims of relief and do not discuss these claim in the body of the pleading. However, because assault and battery are specified in the preliminary statement, the Court will treat these as additional claims for the purposes of Defendants' Motion.

[8] As a preliminary matter, the Court addresses Plaintiffs' contention that the Political Subdivision Tort Liability Act, as codified in Revised Code Chapter 2744, is unconstitutional and thus provides Defendants no basis for a dismissal. Plaintiffs' argument is incorrect. The Sixth Circuit Court of Appeals recently confirmed that the Act is constitutional, noting that no majority decision of the Supreme Court of Ohio has held otherwise. *Ellis v. Cleveland Municipal School Dist.*, 455 F.3d 690, 697 (6th Cir. 2006).

wanton and malicious conduct on the part of the Defendants.

1. Wrongful Death

Plaintiffs bring their wrongful death claim against all Defendants except the City. The Complaint alleges that "Defendant Officers' savage beating and failure to allow [Jones] to submit was done with malice, ill will and intent to harm." It further alleges that "Defendant Police Officers willfully, wantonly, and callously failed to provide [Jones] with appropriate medical care after inflicting injury on him." (Doc. 25 ¶ 70.) Plaintiffs support their assertion that the officers' behavior toward Jones was malicious with the following alleged facts: the officers were aware of the risk of death due to positional asphyxiation and that Jones was at high risk for such a death given his physical build, obvious use of intoxicants, and the prolonged struggle; that despite this knowledge the officers left Jones lying on his stomach while they caught their breath after the struggle; and that after seeing he was not breathing, none of the officers, including the later-arriving supervisors, rendered medical aid to Jones. Furthermore, at least some of the defendants were aware that Jones' handcuffs needed to be removed before firefighters could provide medical care, but none of the officers removed the cuffs after Jones stopped breathing and before the firefighters arrived. Because Plaintiffs have pleaded facts that, if true, could indicate that the officers acted maliciously or in bad faith, neither the officers nor the police supervisors who were also present at the scene are entitled to immunity under Ohio Rev. Code § 2744.03.

With respect to the firefighters, Plaintiffs allege that they refused to evaluate and treat Jones when they first arrived at the scene, at which time Jones was walking and dancing in the parking lot, and that they left the scene of the incident "with knowledge of risk and foreseeable injury" to Jones. As support for their allegation that the firefighters left the scene despite knowing that Jones was likely to require emergency medical care, Plaintiffs cite to the investigative interview of Firefighter Harrison, in which he said, "I knew that when the police get on the scene with someone, it's how Miss Daniels and Mr. Jones acting? If something was going to come up, I didn't want to see it. I didn't want to be privy to it." (Doc. 20 Ex. 16 at 2.)

According to the Ohio Supreme Court, the standard for wanton misconduct is high, defining it as the failure to exercise any care whatsoever and noting that "mere negligence is not converted into wanton misconduct unless the evidence establishes a disposition to perversity on the part of the tortfeasor." *Fabrey v. McDonald Village Police Dept.*, 70 Ohio St.3d 351, 356, 639 N.E.2d 31 (1994). Mindful that it may not dismiss a claim under Rule 12(b)(6) unless it appears beyond doubt that Plaintiffs can prove no set of facts in support of their claim, the Court concludes that the Defendants have failed to demonstrate that the firefighters are entitled to statutory immunity on the wrongful death claim.

Finally, Defendants argue that Streicher, Wright, and Lemmie are entitled to the same immunity granted to the City under Revised Code § 2744.02(A) because "[u]nder Ohio law, when a party sues an

employee of a political subdivision in his official capacity he is protected by the immunity which protects the political subdivision itself." *Oswald v. Lucas Cty Juvenile Detention Ctr.*, No. 99-3771, 2000 WL 1679507 (6th Cir. Oct. 30, 2000). The Court agrees that these Defendants are immune in their official capacities. However, the Complaint expressly pursues its wrongful death cause of action against these city officials in both their official and individual capacities. As the Defendants have set forth no argument with respect to the propriety of the wrongful death claim against these Defendants in their individual capacities, they have not met their burden of proving that dismissal of the claim is warranted.

Therefore, the Court DENIES Defendants' Motion to Dismiss Plaintiffs' third claim of relief under Ohio Revised Code § 2125.01 for wrongful death as to all Defendants.

2. Assault and Battery

To the extent Plaintiffs' Complaint asserts claims against the Defendants for assault and battery, the Court dismisses them as to Defendants firefighters, police supervisors, Police Chief Streicher, City Manager Lemmie, and Fire Chief Wright. None of these Defendants were present at the scene when the six police officers struggled with Jones, thus Plaintiffs can prove no set of facts that would entitle them to relief on these claims. To the extent the Complaint asserts assault and battery claims against the City, the Court finds the City is immune pursuant to Ohio Rev. Code § 2744.02(A)(1), providing that "a political subdivision is not liable in damages in a civil action for

injury, death, or loss to person or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function." Finally, as to the police officers, the attachments to the Complaint reveal that at some point Jones hit Officer Pike. Accordingly, the officers were entitled to make physical contact with Jones for the purpose of effectuating his arrest. *See Hale v. Vance*, 267 F. Supp. 2d 725, 736 (S.D. Ohio 2003). The Court therefore GRANTS Defendants' Motion to Dismiss Plaintiffs' claims for assault and battery against the Defendants.

3. Gross Negligence

Plaintiffs bring a claim against the Defendant Firefighters for gross negligence. As discussed in the preceding section, employees of a political subdivision are immune from suit under Ohio Rev. Code § 2744.03(A)(6) unless the employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner. The allegation of gross negligence is not sufficient to come within the exception to immunity provided by Ohio Rev. Code § 2744.03(A)(6) because gross negligence does not equal malice, bad faith or recklessness. *Burdine v. Szilagyi*, No. 3:98CV7094, 1999 WL 1491774, *12 (N.D. Ohio 1999). Accordingly, Defendant's Motion to Dismiss the Plaintiffs' Fourth Claim of Relief is GRANTED.

4. Loss of Consortium

Plaintiffs bring a separate claim for loss of consortium against all Defendants. Defendants argue that Plaintiff Bessie Jones' loss of consortium claim must be dismissed because Ohio law does not extend the claim of consortium to grandparents. The Court agrees. Pursuant to Ohio Rev. Code § 2125.02(3), damages available in a wrongful death action include "[l]oss of the society of the decedent, including loss of companionship, consortium, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, and education, *suffered by the surviving spouse, dependent children, parents, or next of kin of the decedent*."(emphasis added). Independent of the wrongful death statute, the Ohio Supreme Court has held that a minor child has a cause of action for loss of parental consortium against a third-party tortfeasor who negligently or intentionally causes physical injury to the child's parent. *Gallimore v. Children's Hosp. Med. Ctr.*, 67 Ohio St.3d 244, 244, 617 N.E.2d 1052 (1993). The court did not, however, extend filial consortium claims to the grandparents of emancipated grandchildren.

The case cited by Plaintiffs in support of their position, *Rolf v. Tri-State Motor Transit Co.*, 91 Ohio St.3d 380 (2001) holds that adult emancipated children may recover for loss of parental consortium. It does not address whether a grandparent can recover for loss of a grandchild's consortium. Accordingly, Defendants' Motion to Dismiss Plaintiffs' loss of consortium claim is GRANTED as to Plaintiff Bessie Jones and DENIED as to Jones' two minor sons.

IV. CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss (Doc. 28) is **GRANTED** as to Plaintiffs' § 1983 claim asserting Fourth Amendment violations against Defendant Firefighters, Police Supervisors, and Fire Chief Wright; **GRANTED** as to Plaintiffs' § 1983 claim asserting Fourteenth Amendment violations against Defendant Firefighters and Fire Chief Wright; **GRANTED** as to Plaintiffs' assault and battery claims against all Defendants; **GRANTED** as to Plaintiffs' gross negligence claim against the Firefighters, and **GRANTED** as to Bessie Jones' loss of consortium claim. Defendants' Motion as to all remaining claims is **DENIED**.

IT IS SO ORDERED.

s/Susan J. Dlott
Susan J. Dlott
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 06-4528

[Filed July 31, 2008]

BESSIE JONES, ADMINISTRATRIX OF THE ESTATE OF NATHANIEL JEFFREY JONES, DECEASED, ET AL.,	)
Plaintiffs-Appellees,	)
v.	)
CITY OF CINCINNATI, ET AL.,	)
Defendants-Appellants.	)

BEFORE: MARTIN and SUTTON, Circuit Judges; and OBERDORFER[1], District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other

[1] Hon. Louis F. Oberdorfer, Senior United States District Judge for the District of Columbia, sitting by designation.

active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green
Clerk

APPENDIX D

THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CASE NO. 06-4528

[Filed January 28, 2003]

BESSIE JONES, ADMINISTRATRIX of the ESTATES of NATHANIEL JONES, DECEASED, et al. Plaintiffs-Appellees	)
vs.	)
CITY OF CINCINNATI, et al. Defendants-Appellants	)

On Appeal From The
United States District Court
For The Southern District of Ohio
(Case No. 1:04-CV-616)

DEFENDANTS-APPELLANTS' THIRD ADDITIONAL AUTHORITY

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The Defendants-Appellants provide as additional authority the Court of Appeals, First Appellate District, Hamilton County, Ohio's Judgment Entry in *James Pike and Baron Osterman v. Bessie Jones, Administratrix of the Estate of Nationiel Jeffrey Jones, Deceased*. (January 23, 2008).

Respectfully submitted,

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ATTORNEYS FOR DEFENDANTS-APPELLANTS

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

APPEAL NO. C060657
TRIAL NO. A-0409547

JAMES PIKE,

and

BARON OSTERMAN

Plaintiffs-Appellees,

vs.

BESSIE JONES, Administratrix of the Estate of Nathaniel Jeffrey Jones, Deceased,

Defendant-Appellant.

JUDGMENT ENTRY

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.[1]

[1] See S.Ct.Rep.Op. 3(A), App.r. 11.1(E), and Loc.R.12

Defendant-appellant, Bessie Jones ("Jones'), appeals the summary judgment entered by Hamilton County Court of Common Pleas in favor of plaintiffs-appellees, James Pike and Baron Osterman, in a suit for assault and battery.

Pike and Osterman were Cincinnati police officers. In 2003, they had responded to the scene of a disturbance caused by Nathaniel Jones ("the decedent"), who ultimately died as the officers were attempting to subdue him.

In 2004, Pike and Osterman filed suit against Jones, the administratrix of the decedent's estate. They alleged that the decedent had assaulted them on the night of the disturbance and that they had sustained injuries as a result of the assault.

Pike and Osterman filed a motion for summary judgment. They supported their motion with affidavits describing the details of the assault and their injuries. Jones failed to file a response to the motion, and the trial court granted summary judgment in favor of Pike and Osterman. Jones then filed a motion for relief from the summary judgment, which the trial court denied.

In her first assignment of error, Jones now argues that the trial court erred in entering summary judgment in favor of Pike and Osterman.

Under Civ.R. 56(C), a motion for summary judgment may be granted only when no genuine issue of material fact remains to be litigated, the moving party is entitled to judgment as a matter of law, and it

appears from the evidence that reasonable minds can come to but one conclusion, and with the evidence construed most strongly in favor of the nonmoving party, that conclusion is adverse to that party.[2] The party moving for summary judgment bears the initial burden of demonstrating that no genuine issue of material fact exists, and once it has satisfied its burden, the nonmoving party has a reciprocal burden to set forth specific facts showing that there is a genuine issue for trial.[3] This court reviews the granting of summary judgment de novo.[4]

In this case, the grant of summary judgment was proper. Pike and Osterman submitted affidavits establishing that the decedent had committed assault and battery and that they had sustained injuries as a result. The affidavits indicated that the assault was unprovoked and that the officers had been merely attempting to defuse a volatile situation. Accordingly, they met their initial burden of establishing that there was no issue of material fact.

Jones filed no response to the summary-judgment motion and thus failed to meet her reciprocal burden of establishing that issues of material fact remained. Accordingly, we overrule the first assignment of error.

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[2] See *State ex rel. Howard v. Ferreri*, 70 Ohio St.3d 587, 589, 1994-Ohio-130, 639 N.E. 2d 1189.

[3] See *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107, 662 N.E. 2d 264.

[4] *Jorg. v. Cincinnati Black United Front*, 153 Ohio. App.3d 258, 2003-Ohio-3668, 792 N.E.2d 781, at ¶6.

In the second and third assignments of error, Jones argues that the trial court erred in overruling her motion for relief from judgment under Civ.R. 60(B).

A party seeking relief from judgment must show that it has a meritorious claim or defense to present if relief is granted, that it is entitled to relief under one of the grounds set forth in Civ.R. 60(B)(1) through (5), and that the motion has been made within a reasonable time.[5] A trial court's ruling on Civ.R. 60(B) motion will not be reversed absent an abuse of discretion.[6]

In this case, there was no abuse of discretion. Jones did not demonstrate that she was entitled to relief under any specific subsection of Civ. R. 60(B). She stated only that her attorney's drug problem had led to his failure to respond to the summary-judgment motion, and she contended that his dereliction constituted excusable neglect. But evidence of the drug problem does not appear in the record, and in any event, the neglect of an attorney is imputed to the client.[7] The record does not support a finding of excusable neglect under Civ.R. 60(B)(1), and we overrule the second and third assignments of error.

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[5] *GTE Automatic Electric, Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St. 2d 146, 150-151, 351 N.E.2d 113.

[6] *Frazier v. Cincinnati School of Med. Massage*, 1st Dist. No. C-060359, 2007-Ohio-2390, at ¶43.

[7] *GTE*, supra, at 153, 351 N.E.2d 113.

In her fourth and fifth assignments of error, Jones argues that Pike and Osterman were required to assert their cause of action as counterclaims in Jones's federal lawsuit against the Cincinnati police. Although Jones has attached a copy of the federal complaint to her brief, evidence of the federal proceedings was not properly made a part of the record on appeal.[8] Therefore, we cannot address Jones's arguments on their merits, and we overrule the fourth and fifth assignments of error.

The judgment of the trial court is affirmed.

Further, a certified copy of this judgment entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HILDEBRANDT, P.J., PAINTER and HENDON, JJ.

To the Clerk:

Entered upon the Journal of the Court on January 23, 2008 per order of the Court _____
Presiding Judge

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[8] See, e.g., *Lassiter v. Lassiter*, 1st Dist. Nos. C-020494, C-020370, and C020128, 2003-Ohio 2333, at ¶2 (record cannot be augmented by appendix to brief where material was not part of the trial court's proceedings).

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO
CIVIL DIVISION

CASE NO. A-0409547

[Entered July 19, 2006]

JAMES PIKE)
)
and)
)
BARON OSTERMAN)
)
Plaintiffs)
)
vs.)
)
BESSIE JONES, ADMINISTRATRIX)
OF THE ESTATE OF NATHANIEL)
JEFFREY JONES, DECEASED)
)
Defendant)

FINAL ENTRY GRANTING PLAINTIFFS JAMES PIKE AND BARON OSTERMAN'S MOTION FOR SUMMARY JUDGMENT AND DETERMINING DAMAGES

By Judge Ralph E. Winkler

This matter was before the Court on June 22, 2006, for a hearing on damages and attorneys fees. Attorney Gary R. Lewis was present for the Plaintiffs and

attorney Kenneth L. Lawson was present for the Defendant.

On May 17, 2006, the Court granted Plaintiffs' motion for summary judgment in part, finding that the Plaintiffs were entitled to judgment as a matter of law as to the Defendant's liability to Plaintiffs on Count One (Battery) and Count Two (Assault) as alleged in the Complaint. The Court further found that the Plaintiffs were entitled to punitive damages and attorneys fees. The case was continued until June 22, 2006 for a determination of the amount of compensatory damages, the amount of punitive damages and attorneys fees to be awarded to Plaintiffs.

In addition to the materials previously considered by the Court, the following were filed with the Court subsequently to the entry of May 17, 2006 and have been considered:

a) Supplemental Affidavit of James Pike, filed June 9, 2006;

b) A video tape copy of relevant portions of police mobile video recorders, with recordings of the incident of November 30, 2003, filed with the Court on June 6, 2006;

c) Affidavit of Gary R. Lewis with itemizations of time for legal work done on the case, filed on June 19, 2006.

The Court also adopts and incorporates by reference the findings of fact and conclusions of law in

the Court's Entry Denying Defendant's Motion for Relief from Final Judgment, with Findings of Facts and Conclusions of Law.

The Court, having considered all of the above, having heard the arguments of counsel, and being fully advised, hereby renders judgment against Defendant Bessie Jones, Administratrix of the Estate of Nathaniel Jones as follows. Plaintiffs James Pike and Baron Osterman are granted judgment for compensatory damages in the amount of $5,000.00 each, for a total of $10,000.00 in compensatory damages. Plaintiffs James Pike and Baron Osterman are granted judgment for punitive damages in the amount of $8,000.00 each for a total of $16,000.00 in punitive damages. Further, Plaintiffs James Pike and Baron Osterman are granted judgment for attorneys fees and expenses in the amount of $15,625.00 for a total judgment of $41,625.00.

Costs are assessed to Defendant.

SO ORDERED

/s/
Ralph E. Winkler

COURT OF COMMON PLEAS
ENTER
THE CLERK SHALL SERVE
NOTICE TO PARTIES
PURSUANT TO CIVIL RULE 56
WHICH SHALL BE TAXED

/s/

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COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO
CIVIL DIVISION

CASE NO. A-0409547

[Entered July 19, 2006]

JAMES PIKE	)
	)
and	)
	)
BARON OSTERMAN	)
	)
Plaintiffs	)
	)
vs.	)
	)
BESSIE JONES, ADMINISTRATRIX OF THE ESTATE OF NATHANIEL JEFFREY JONES, DECEASED	)
	)
Defendant	)

ENTRY DENYING DEFENDANT'S MOTION FOR RELIEF FROM FINAL JUDGMENT WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

By Judge Ralph E. Winkler

This matter was before the Court on June 22, 2006, on the Defendant's Motion for Relief from Final Judgment. Attorney Gary R. Lewis was present for

the Plaintiffs and attorney Kenneth L. Lawson was present for the Defendant. Plaintiffs filed a memorandum in opposition to Defendant's motion. Plaintiffs have also filed the Affidavit of Gary R. Lewis in Support of Plaintiffs Memorandum in Opposition to Defendant's Motion and a VHS cassette copy of portions of police cruiser video recorder tapes, with recordings of the incident of November 30, 2003. Defendant did not submit any evidentiary materials to the Court in support of Defendant's Motion for Relief From Final Judgment.

The Court further finds that Plaintiffs' motion for summary judgment was served upon attorneys Kenneth L. Lawson and David S. Washington by ordinary mail on March 31, 2006, the date the motion was filed. On April 17, 2006, a proposed entry granting the motion for summary judgment was submitted to the Court by Plaintiffs' attorney and mailed to attorneys Mr. Lawson and Mr. Washington. The Court set Plaintiffs motion for summary judgment in part for hearing on May 16, 2006. Prior to the motion for summary judgment being granted in part on May 16, 2006, the Defendant failed to respond to the motion for summary judgment and failed to request additional time in which to respond to the motion. The Court finds that the Defendant has failed to establish any reason justifying the failure to file a memorandum in opposition to Plaintiffs' motion for summary judgment.

In addition to consideration of the above, the Court has heard the arguments of counsel.

The Court, being fully advised herein, hereby finds that the Defendant has failed to establish any mistake, inadvertence, surprise or excusable neglect under Civ.R.60(B)(1). The Court further finds that the Defendant has failed to establish any other basis for relief under Civ.R.60(B)(2) through (5). The Court further finds that the Defendant has failed to establish any meritorious defense to the claims alleged in Plaintiffs' Complaint.

The Court further makes the following findings of fact and conclusion of law.

1) Plaintiffs, police officers James Pike and Baron Osterman, responding to a request for police assistance at a White Castle Restaurant shortly before 6:00 a.m. on November 30, 2003. Both officers were in uniform at the time. Upon arrival, the officers observed Nathaniel Jones acting erratically, dancing with his hands in the air.

2) Officer Pike initiated a conversation at that time with Mr. Jones, who responded with profanity. Mr. Jones then approached Officer Pike and Officer Osterman in an aggressive manner. Officer Pike told Mr. Jones to back up. Mr. Jones did not back up at that time, but continued towards Officer Pike and Officer Osterman.

3) Officer Osterman ordered Mr. Jones to back up and Mr. Jones did back up temporarily. Officer Pike directed Mr. Jones to stand where he was, in order to assess the situation.

4) Shortly thereafter, Mr. Jones again directed profanity toward Officer Pike. Mr. Jones the approached Officer Pike in a threatening manner. As Mr. Jones approached Officer Pike, his pace increased. Officer Pike backed up, away from Mr. Jones while giving verbal commands to Mr. Jones to back up. Mr. Jones ignored the verbal commands of Officer Pike to back up.

5) Officer Pike then applied chemical irritant to Mr. Jones, which apparently had no affect. At that point, Mr. Jones lunged at Officer Pike, and struck Officer Pike on the head. Mr. Jones also grabbed Officer Pike by the head and put him in a head lock. Officer Pike was able to escape from the head lock and called for assistance.

6) When Officer Osterman observed Mr. Jones move toward Officer Pike in an aggressive manner, Officer Osterman responded to the from of Officer Pike's vehicle. At the time, Officer Pike and Mr. Jones were actively engaged in an altercation. Mr. Jones had pushed Officer Pike back upon Officer Pike's vehicle. Officer Osterman delivered three or four strikes with PR-24 police baton to the outside of Mr. Jones' right thigh and gave Mr. Jones commands to "get down". Mr. Jones did not comply with these commands. At that point, Mr. Jones had Officer Pike by the neck. Officer Osterman took Mr. Jones to the ground along with Officer Pike, in an attempt to keep Mr. Jones on the ground.

7) After Mr. Jones committed the assault and battery upon Officer Pike, Officer Osterman gave Mr. Jones commands to get down. Mr. Jones refused to

disengage from Officer Pike. Mr. Jones grabbed Officer Pike by the collar of his jacket. Officer Pike's left hip struck the police vehicle when Officer Pike, Mr. Jones and Officer Osterman fell to the ground. Officer Pike then ordered Mr. Jones to place his hands behind his back. Mr. Jones did not comply with that order. Officer Pike applied strikes with his PR-24 police baton to Mr. Jones' back, in an attempt to gain compliance. Mr. Jones then attempted unsuccessfully to get control of Officer Pike's PR-24 police baton. Mr. Jones, Officer Pike and Officer Osterman went to the ground a second time.

8) Officer Pike delivered PR-24 strikes to the torso area of Mr. Jones, while giving commands for Mr. Jones to place his hands behind his back. Mr. Jones did not comply with these demands. Mr. Jones grabbed the back of Officer Osterman's head and attempted to pull him to the ground, causing an injury behind Officer Osterman's ear. Mr. Jones also began pulling Officer Osterman down by his uniform jacket. Officer Osterman delivered PR-24 strikes in an attempt to break Mr. Jones' grip on Officer Osterman's jacket.

9) During the altercation with Mr. Jones, Officer Pike sustained injuries to his lower back, left ankle, left ear, left side of his face, left hand, the back of his neck and left temple. Officer Pike also sustained injuries to his left hip and right inner thigh, cuts to his lip and inside his mouth.

10) Prior to the time Mr. Jones first struck Officer Pike, Mr. Jones has been told numerous times to back up. Officer Pike did not initiate physical contact with

Mr. Jones, nor did Officer Pike give Mr. Jones consent to touch him. The Court finds that the injuries identified in the Affidavit of James Pike, filed with the Court on March 31, 2006, were caused by Mr. Jones.

11) In an attempt to bring Mr. Jones under control, other police officers responded to assist Officer Pike and Officer Osterman. During the altercation with Mr. Jones, he was given many commands by various police officers to get down, and to place his hands behind his back. Mr. Jones did not comply with these demands. At times during the altercation with Mr. Jones, and because of the assault by Mr. Jones and the threatening conduct of Mr. Jones, Officer Pike was in apprehension of immediate bodily harm.

12) During the altercation with Mr. Jones, Officer Osterman sustained an injury behind his left ear, caused by Mr. Jones when Mr. Jones attempted to pull him to the ground. Officer Osterman did not give Mr. Jones consent to touch him. The Court finds that the injury identified in the Affidavit of Baron Osterman, filed with the Court on March 31, 2006, was caused by Mr. Jones. At times during the altercation with Mr. Jones, and because of the assault and battery by Mr. Jones, Officer Osterman was in apprehension of immediate bodily harm.

/s/
Judge Winkler

/s/

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APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. 1:04CV616

[Filed March 1, 2005]

BESSIE JONES, ADMINISTRATRIX)
OF THE ESTATE OF NATHANIEL)
JEFFREY JONES, DECEASED)
C/o Kenneth L. Lawson & Associates, LPA)
808 Elm Street, Suite 100)
Cincinnati, Ohio 45202)
)
And)
)
BESSIE JONES)
C/o Kenneth L. Lawson & Associates, LPA)
808 Elm Street, Suite 100)
Cincinnati, Ohio 45202)
)
And)
)
NATHANIEL JONES, JR., by his next of)
Friend, Leslie Nash)
C/o Kenneth L. Lawson & Associates, LPA)
808 Elm Street, Suite 100)
Cincinnati, Ohio 45202)

And)
)
Tyriq A. Holley, by his next of)
Friend, Valarie Holley-Staten)
C/o Kenneth L. Lawson & Associates, LPA)
808 Elm Street, Suite 100)
Cincinnati, Ohio 45202)
)
Plaintiffs,)
)
vs.)
)
CITY OF CINCINNATI)
801 Plum Street)
Cincinnati, Ohio 45202)
)
and)
)
THOMAS STREICHER, JR.)
CHIEF OF POLICE OF THE)
CITY OF CINCINNATI)
(Individually and in his official capacity))
)
and)
)
ROBERT WRIGHT)
FIRE CHIEF)
CITY OF CINCINNATI)
(Individually and in his official capacity))
)
and)
)
VALERIE LEMMIE)
CITY MANAGER)

CITY OF CINCINNATI)
(Individually and in her official capacity))
)
SERVE)
CITY SOLICITOR)
CITY OF CINCINNATI)
801 Plum Street, Room 214)
Cincinnati, Ohio 45202)
)
and)
)
POLICE OFFICER GUY ABRAMS)
Cincinnati Police Division)
District 5)
1012 Ludlow Avenue)
Cincinnati, Ohio 45223)
(Individually and in his official capacity))
)
and)
)
POLICE OFFICER JAMES PIKE)
Cincinnati Police Division)
District 5)
1012 Ludlow Avenue)
Cincinnati, Ohio 45223)
(Individually and in his official capacity))
)
and)
)
POLICE OFFICER JOEHONNY REESE)
Cincinnati Police Division)
District 5)
1012 Ludlow Avenue)
Cincinnati, Ohio 45223)
(Individually and in his official capacity))

and)
)
POLICE OFFICER JAY JOHNSTONE)
Cincinnati Police Division)
District 5)
1012 Ludlow Avenue)
Cincinnati, Ohio 45223)
(Individually and in his official capacity))
)
and)
)
POLICE OFFICER BARON OSTERMAN)
Cincinnati Police Division)
District 5)
1012 Ludlow Avenue)
Cincinnati, Ohio 45223)
(Individually and in his official capacity))
)
and)
)
POLICE OFFICER THOMAS SLADE)
Cincinnati Police Division)
District 5)
1012 Ludlow Avenue)
Cincinnati, Ohio 45223)
(Individually and in his official capacity))
)
and)
)
POLICE OFFICER LEROY BRAZILE)
Cincinnati Police Division)
District 5)
1012 Ludlow Avenue)
Cincinnati, Ohio 45223)
(Individually and in his official capacity))

and)
)
POLICE OFFICER JAMES WAITES)
Cincinnati Police Division)
District 5)
1012 Ludlow Avenue)
Cincinnati, Ohio 45223)
(Individually and in his official capacity))
)
and)
)
POLICE OFFICER JEFFREY BATTISON)
Cincinnati Police Division)
District 5)
1012 Ludlow Avenue)
Cincinnati, Ohio 45223)
(Individually and in his official capacity))
)
and)
)
FIREFIGHTER GREGORY ADAMS)
Cincinnati Fire Department)
Engine 38)
725 Circle)
Cincinnati, Ohio 45232)
(Individually and in his official capacity))
)
and)
)
FIREFIGHTER TYRONE HARRISON)
Cincinnati Fire Department)
Engine 38)
725 Circle)
Cincinnati, Ohio)
(Individually and in his official capacity))

and)
)
FIREFIGHTER BRIAN OTTEN)
Cincinnati Fire Department)
Ladder 24)
4526 Glenway Avenue)
Cincinnati, Ohio 45205)
(Individually and in his official capacity))
)
Defendants.)
_____)

(Judge Dlott) (Jury Demand)

SECOND AMENDED COMPLAINT

I. *PRELIMINARY STATEMENT*

This is a civil rights action against the Cincinnati Police Department, Cincinnati Fire Department, individual Defendant Cincinnati Police Officers and the individual Cincinnati firefighters seeking damages to redress the violation of Nathaniel Jeffrey Jones's Fourth Amendment right to be free from unreasonable seizure, excessive force, Fourteenth Amendment right to receive immediate and appropriate medical care for injuries inflicted by the Defendants, Fourteenth Amendment right not to be deprived of his life without due process, and the following state law tort claims: assault, battery, wrongful death and gross negligence. Specifically, Defendants Abrams, Pike, Reese, Johnston, Osterman and Slade repeatedly beat Mr. Jones with PR-24s even after he surrendered, then exerted several pounds of pressure (some or all of their combined weight) upon his back while handcuffing him

causing respiratory failure commonly referred to as "positional asphyxia." Further, they failed to ensure that Mr. Jones could breathe after crushing him and twice spraying him with chemical irritant, failed to sit him up or turn him over so that he could breathe, and when they realized he was not breathing, intentionally failed to administer CPR. Defendant Firefighters witnessed the beginning of the beating, yet they left the scene knowing there was a substantial likelihood that emergency medical attention would be needed. All individual Defendants failed to provide necessary emergency medical care, causing the death of decedent Jones. The Defendant police officers actions caused Mr. Jones death. Further, the beating with PR-24s and killing of Mr. Jones by Defendants Abrams, Pike, Reese, Johnston, Osterman and Slade is a continuing and pervasive pattern of civil rights abuses by the City of Cincinnati police officers against persons who live within the City. The beating and killing of Mr. Jones by Defendants Abrams, Pike, Reese, Johnstone, Osterman and Slade directly resulted from the Defendant City of Cincinnati's (hereinafter referred to as "City") deliberate conduct in allowing their written policies to be unilaterally abandoned at the discretion of individual officers, thus encourage and acquiesces in Fourth and Fourteenth Amendment rights violations. In addition, the beating and killing of Mr. Jones by Defendants Abrams, Pike, Reese, Johnston, Osterman and Slade is a direct result of the deliberate indifference of the City in failing to adequately train, supervise and discipline police officers. Supervisors called to the scene, Defendants Waites, Brazile, and Battison all failed to provide immediate emergency medical care after observing that Mr. Jones was not breathing.

Additionally, this is an action against all the individual Defendants for wrongful death pursuant to, §2125.01 of the Ohio Revised Code.

Defendants City of Cincinnati and Firefighters Harrison, Adams, and Otten (hereinafter collectively referred to as "Firefighters") are being sued for negligence. Defendant Firefighters and the Defendant Cincinnati Fire Department's conduct action(s) or lack thereof, constituted willful, wanton misconduct and resulted in their intentional failure and/or disregard of Defendants' duty, which amongst other things is to provide immediate emergency medical care to persons injured in the course of being apprehended. All Defendants failed to provide immediate, emergency medical care. Specifically, Defendants Firemen, with knowledge of the surrounding circumstances and existing conditions watched Nathaniel Jones undergo a severe beating and with deliberate indifference to the foreseeable and probable injuries to Mr. Jones, Defendant individual firefighters demonstrated a deliberate and/or reckless disregard for the safety and well being of Mr. Jones by fleeing the scene with knowledge that Mr. Jones never received medical assessment and/or medical treatment.

II. *JURISDICTION AND VENUE*

1. This action is being filed pursuant to 42 U.S.C. §1983 to redress injuries suffered by Plaintiff for deprivation under color of state law of rights secured by the Fourth and Fourteenth Amendments to the United States Constitution. This Court has jurisdiction pursuant to 28 U.S.C. §1331.

This Court has supplemental jurisdiction of the state law claims pursuant to 28 U.S.C. §1367.

2. Venue in the United States District Court, Southern District of Ohio, Western Division, is proper pursuant to 28 U.S.C. §1391.

III. *PARTIES*

3. Plaintiff Bessie Jones is a resident of Cincinnati, Ohio and is the Administratrix of the Estate of Nathaniel Jones. She brings the civil rights action on behalf of the Estate of Nathaniel Jones, and the wrongful death action on behalf of herself as Mr. Jones's grandmother, and Nathaniel Jones's sons Nathaniel Jones, Jr., and Tyriq A. Holley. (Mr. Jones, the deceased, will be referred to as Plaintiff in the body of the Complaint).

4. Plaintiff Nathaniel Jones, Jr. a minor, brings this action through his mother and next of friend Leslie Nash. At the time of the injury, Plaintiff Nathaniel Jones, Jr. was a resident of Cleveland, Ohio, and currently is a resident of North Carolina.

5. Plaintiff Tyriq A. Holley, a minor brings this action through his mother and next of friend, Valerie Holley-Staten. Plaintiff Tyriq Holley is a resident of Garfield Heights, Ohio.

6. Defendant Abrams is a City of Cincinnati police officer. Defendant Abrams is sued in

his individual and official capacity. At all times relevant to this action, Defendant Abrams acted under color of law.

7. Defendant Pike is a City of Cincinnati police officer. Defendant Pike is sued in his individual and official capacity. At all times relevant to this action, Defendant Pike acted under color of law.

8. Defendant Reese is a City of Cincinnati police officer. Defendant Reese is sued in his individual and official capacity. At all times relevant to this action, Defendant Reese acted under color of law.

9. Defendant Johnstone is a City of Cincinnati police officer. Defendant Johnstone is sued in his individual and official capacity. At all times relevant to this action, Defendant Johnstone acted under color of law.

10. Defendant Osterman is a City of Cincinnati police officer. Defendant Osterman is sued in his individual and official capacity. At all times relevant to this action, Defendant Osterman acted under color of law.

11. Defendant Slade is a City of Cincinnati police officer. Defendant Slade is sued in his individual and official capacity. At all times relevant to this action, Defendant Slade acted under color of law.

12. Defendant Waites is a City of Cincinnati police officer. Defendant Waites is sued in his individual and official capacity. At all times relevant to this action, Defendant Waites acted under color of law.

13. Defendant Brazile is a City of Cincinnati police officer. Defendant Brazile is sued in his individual and official capacity. At all times relevant to this action, Defendant Brazile acted under color of law.

14. Defendant Battison is a City of Cincinnati police officer. Defendant Battison is sued in his individual and official capacity. At all times relevant to this action, Defendant Battison acted under color of law.

15. Defendant Gregory Adams is a City of Cincinnati fire fighter. Defendant Adams is a supervisor and is sued in his individual and official capacity. At all times relevant to this action, Defendant Adams acted under color of law.

16. Defendant Tyrone Harrison is a City of Cincinnati fire fighter. Defendant Harrison is sued in his individual and official capacity. At all times relevant to this action, Defendant Harrison acted under color of law.

17. Defendant Brian Otten is a City of Cincinnati fire fighter. Defendant Otten is sued in his individual and official capacity.

At all times relevant to this action, Defendant Otten acted under color of law.

18. Defendant City of Cincinnati is a municipal corporation, organized and existing under the laws of the State of Ohio. At all times relevant to this action the City of Cincinnati employed, controlled or had the right to control Defendants Abrams, Pike, Reese, Johnstone, Osterman, Slade, Adams, Harrison, and Otten. At all times throughout this Complaint, it is alleged and reincorporated, that Defendants Abrams, Pike, Reese, Johnstone, Osterman and Slade's action of beating and killing Mr. Jones, was a continuing pattern of civil rights abuses by City of Cincinnati police officers against persons who live within the City that results from the Defendant City's deliberate conduct in establishing policy and custom that encourages and acquiesces in Fourth and Fourteenth Amendment rights violations. In addition, Defendant police officers' action of beating and killing Mr. Jones was a direct result of the deliberate indifference on the City's part in failing to adequately train, supervise and discipline police officers. Defendant Firemen's actions were also a direct result of the deliberate indifference on the City's part in failing to adequately train, supervise and discipline firemen.

19. Defendant Thomas Streicher, Jr. is the Chief of Police for the Cincinnati Police

Department, and at all times relevant to this action was responsible for establishing policy for the CPD, and for the training, supervising and disciplining Defendants Abrams, Pike, Reese, Johnstone, Osterman, Slade, Battison, Waites, and Brazile. Defendant Streicher is sued in his individual and official capacity. At all times relevant to this action, Defendant Streicher acted under color of law.

20. Defendant Lemmie is the City Manager, and at all times relevant to this action was responsible for establishing and enforcing policies for the City and its departments, including the Cincinnati Police Department and Fire Department. Defendant Lemmie is sued in her individual and official capacity. At all times relevant to this action, Defendant Lemmie acted under color of law.

21. Defendant Robert Wright is the Fire Chief for the City of Cincinnati and at all times relevant to this action was responsible for establishing policy for the CFD, and for training, supervising and disciplining Defendants Adams, Harrison, and Otten. Defendant Wright is sued in his individual and official capacity. At all times relevant to this action, Defendant Wright acted under color of law.

22. Defendants Abrams, Pike, Reese, Johnston, Osterman and Slade's action of beating and killing Mr. Jones, and Defendants Adams,

Harrison, and Otten's failure to stand ready to provide emergency medical care when faced with substantial likelihood of injuries, were the direct result of the City's unwritten custom and/or policy of allowing their officers to abandon the written City policies at the unilateral discretion of the Defendant Officers and Defendant Firefighters. As a result of Defendant City's "unwritten" policies and customs, deliberate indifference, and deliberate conduct as described above, the City is the "moving force" behind Defendants Abrams, Pike, Reese, Johnston, Osterman and Slade's act of beating and killing Mr. Jones. Further, Defendant City's conduct in failing to properly discipline its officers and firemen for abandoning written polices at their discretion is the moving force behind the individual Defendant police officers' and Defendant firefighters' conduct.

IV. *FACTS*

23. Each and every paragraph is respectively incorporated throughout this entire Complaint.

24. On November 28, 2003 Plaintiff visited the White Castle Restaurant at 64 W. Mitchell Avenue, to among other things visit with some very close friends. Plaintiff drove to the White Castle with his brand new puppy in the car.

25. On Saturday, November 29, 2003 Plaintiff drove a close friend to his home in Cleveland, Ohio and prior to his return that evening to Plaintiff's home in Cincinnati, Ohio stopped once again to visit friends at the White Castle located at 64 W. Mitchell Avenue, Cincinnati, Ohio. This time without his puppy.

26. Sometime between the a.m. hours of 3:00 and 5:30 on November 30, 2003, while visiting the White Castle's restaurant, Plaintiff became ill and desperately needed medical attention. Plaintiff loss consciousness and fell to the pavement in the White Castle's parking lot.

27. A female employee of White Castle ran inside and dialed 911 seeking emergency medical treatment for Plaintiff.

28. Sometime later, the Cincinnati Fire Department responded to White Castle pursuant to the request for medical services.

29. Individual Defendant firefighters directed their attention to the female employee who had in her moment of deep concern for Plaintiff begun to hyperventilate. Defendant firefighters began to administer aid to the female White Castle employee.

30. At some point, the Plaintiff regained consciousness and entered White Castle. His close friend and employee of White Castle's,

noticed his condition, handed him a cup of water and directed the Defendant firefighters' attention to him.

31. Individual Defendant firefighters refused to evaluate treat and/or care for Plaintiff. On information and belief, Defendant firefighters told the female employee of White Castle's, that they would not treat Plaintiff but would call the police department.

32. On information and belief, the female White Castle's employee stated to Defendant firefighters that the police were not needed and that Plaintiff needed their medical attention.

33. Moments later, Plaintiff walking and dancing, exited the White Castle Restaurant. He continued in a like manner in the parking lot.

34. At no time was Plaintiff committing an unlawful act, nor was he causing damage to persons or property.

35. At some point Defendant firefighters contacted the Cincinnati police radio by way of the dispatcher. Defendant firefighters described Plaintiff as being a nuisance, although Defendant firefighters never personally attempted to speak with Plaintiff or to assess his condition, and received no complaint about Plaintiff's behavior from

employees from White Castle, who called the firemen to provide medical assistance.

36. At some point Defendant Police Officers began to arrive at the White Castle.

37. Defendant Police Officer Pike contacted the dispatch and requested an MHRT (Medical Help Response Team) to respond to the scene, and also requested a supervisor with a tazer. Defendants Officers Pike and Osterman approached Plaintiff and unlawfully tried to subdue him rather than waiting for a MHRT or a supervisor with a tazer to respond. In fact, Defendant Police Officer Pike made a decision that no MHRT was needed, and immediately approached Plaintiff even though MHRT unit and a supervisor were in route. Pike Interview Tr. p. 3 (Ex. 1)

38. Defendant Officer Pike failed to maintain an appropriate reactionary gap. Plaintiff was not presenting a danger to any person or property when Defendant Officer Pike approached him, thus no officer should have approached within twenty-one feet of Plaintiff. Had Defendant Officer Pike maintained an appropriate reactionary gap, no assault would have occurred, and neither Plaintiff nor Defendants would have suffered any injury whatsoever.

39. Defendant Officers Pike and Osterman began to savagely beat Plaintiff with their

PR-24s. Pike Interview Tr. pp. 5-6 (Ex. 1); Osterman Interview Tr. p. 5 (Ex. 2) Defendant Officers Abrams, Slade, Reese also arrived and began using their PR-24s on Plaintiff as well. Slade Interview Tr. p. 2 (Ex. 3); Abrams Interview Tr. p. 2 (Ex. 4); Reese Interview Tr. p. 2 (Ex. 5) Plaintiff was struck at least 33 times in quick succession. The Officers never allowed him an opportunity to comply with verbal commands to put his hands behind his back, or to be placed in a sitting position that would allow air to enter his lungs. As Plaintiff waived his hands in attempts to ward off the blows, the Defendant officers continued to strike him, even when he was on his hands and knees, unable to place his hands behind his back or to strike at the Defendant officers. At no time did Defendant police officers disengage or deescalate as recommended by Cincinnati Police Department (CPD) Policy 12.545 (Ex. 6). Defendant Officers' savage beating and failure to allow Plaintiff to submit was done with malice, ill will and intent to harm.

40. According to Defendant Lemmie, CPD policy 12.545 does not require Officers to disengage or de-escalate to allow a suspect to submit to arrest, but rather gives Officers total discretion in deciding whether to disengage. Lemmie Ltr. 11/1/04 (Ex. 7)

41. Defendant City's policy allows continuous beating of persons by Police Officers without

any interruption to determine whether the person will allow Officers to apply handcuffs and take them into custody.

42. Defendant Lemmie also admits the City's policies allow Officers to exert force "that is not necessarily "consistent" with the degree of resistance, so long as such actions are in accordance with CPD policy." *Id.*

43. Defendant Officers Pike and Slade sprayed chemical irritant in Plaintiff's face. Defendant Slade sprayed Plaintiff after confirming that Officer Pike had already deployed chemical irritant and after Plaintiff was prone and multiple sets of handcuffs were being placed on his wrists. Slade Interview Tr. p.2 (Ex. 3) The chemical irritant was sprayed in Plaintiff's face while Defendant officers used the combined force of their bodies to press undue weight on the Plaintiff's back restricting movement of Plaintiff's diaphragm resulting in lack of air exchange in his lungs.

44. Defendant Osterman admitted the Officers had the advantage as while Plaintiff was on his hands and knees, they were on top of him. Osterman Interview Tr. p. 6 (Ex. 2) Defendant Officers Osterman, Abrams, Johnstone, Pike, Reese, and Slade pressed Plaintiff down to the ground as they handcuffed him.

45. As Defendant Police Officers pressed their combined weight on Plaintiff, and he struggled to twist his body from under the crushing weight so that he could breathe, the Defendant police officers exerted additional force, preventing Plaintiff from getting any air, and putting further strain on Plaintiff's heart. After several minutes of struggling and pressing their weight on Plaintiff, the Defendant Officers had Plaintiff face down on the ground, with his hands cuffed behind his back. Leaving Plaintiff in this position, Defendant police officers stood up and walked around to catch their breath from the prolonged struggle.

46. Defendant Police Officers ignored Plaintiff, and left him face down in handcuffs while they sought to regain their breath. Although they were struggling to regain their breath after the prolonged struggle and did not hear any gasps or sounds of breath coming from Plaintiff, Defendant Officers did not look to see if Plaintiff was breathing, and took no action to ensure that he could breathe; they did not roll him over or immediately sit him up.

47. Defendant Osterman did not look to see if Plaintiff was breathing. Although he knew Plaintiff was not breathing when Plaintiff was rolled over, Defendant Osterman did not provide any respiratory support, mouth-to mouth or CPR. Osterman Interview Tr. pp. 14-15 (Ex. 2)

48. Defendant Pike knew Plaintiff was not breathing and had weak or no pulse. Defendant Pike did not provide any respiratory support, mouth-to mouth or CPR. Pike Interview Tr. p. 7 (Ex. 1)

49. Defendant Abrams saw Defendant Pike take Plaintiff's pulse, knew Plaintiff was not breathing, knew of the risk of Positional Asphyxia, but did not provide any respiratory support, mouth-to mouth or CPR. Abrams Interview Tr. pp. 7-8 (Ex. 4)

50. Defendant Slade knew Plaintiff was not breathing, told others that Plaintiff was not breathing, but did not provide any respiratory support, mouth-to mouth or CPR. Slade Interview Tr. pp. 3-4 (Ex. 3)

51. Defendant Johnstone made no effort to determine if Plaintiff was breathing, even though he knew Plaintiff was laying face down and thus there was a risk of Positional Asphyxia. Johnstone Interview Tr. pp. 3-4 (Ex. 8)

52. Defendant Reese heard that Plaintiff was not breathing, provided sternum rubs but did not provide mouth-to mouth or CPR even after seeing Plaintiff's complexion changing colors. Defendant Reese was aware of the risks of Positional Asphyxia. Reese Interview Tr. p. 11 (Ex. 5)

53. Defendant Waite arrived, saw Plaintiff face down and the Officers breathing heavy, but it did not occur to him to have anyone roll Plaintiff over even though he was aware of the risks from Positional Asphyxia. Waite Interview Tr. p. 9 (Ex. 9) After seeing others roll Plaintiff over, Defendant Waite made no effort to determine if Plaintiff needed emergency medical care, made no effort to have handcuffs removed, gave no assistance to Plaintiff who looked as if he had no life left in him. *Id.* at p. 10. Defendant Waite was more interested in securing the crime scene than ensuring that Plaintiff got medical care.

54. Defendant Waite was aware that Plaintiff needed mouth-to-mouth but did not administer it or order any officer to do so because they did not have a barrier and Plaintiff had froth coming from his mouth. *Id.* at p.12.

55. Defendant police officer's conduct was in direct violation of CPD policy 12.545 Section E that states in pertinent part: "Officers may not keep a sprayed individual in a face-down position any longer than necessary to handcuff or end the threat of harm or escape." (Ex. 6) Further, CPD Training Bulletin #2003/1 also warns that after a struggle, "Once the individual is controlled, move him to a seated position. Do not leave the person prone on the ground. Look for signs of troubled breathing – Gasping,

shallow breathing. . ." The CPD Staff Notes emphasize, "As soon as possible get handcuffed person off their stomachs and into a seated or standing position." CPD Training Bulletin (Ex. 10)

56. After brutally beating Plaintiff and spraying him with chemical irritant, Defendant Police Officers left Plaintiff laying face down on his stomach, hands cuffed behind his back on the asphalt pavement for a prolonged time, which directly contributed to and caused Plaintiff's death. Finally, Defendant police officers noticed that Plaintiff was not breathing. Defendant police officers stood there and discussed the absence of fire personnel.

57. Defendant Firefighters began to watch this beating and, with knowledge of risk and foreseeable injury to Plaintiff caused by the severe beating with a PR-24, left the scene of the incident.

58. No Police Officer requested that Firefighters remain on the scene, knowing there was a substantial risk of injury to Plaintiff, which would require emergency medical assistance.

59. Defendant Police Officers were aware of the risk of death as a result of the CPD's February 25, 2003 training on avoiding death in custody of positional asphyxiation. That Training Bulletin states in relevant part that:

Information

Consider this scenario. A number of officers arrive on the scene of a disorderly person threatening passers-by. They observe a somewhat overweight and intoxicated individual, extremely agitated, sweating profusely, and yelling. As the officers attempt to control the individual, a violent struggle ensues. The individual ends up face down on the ground and is handcuffed. A few minutes later, the individual stops breathing.

Put simply, positional asphyxia can occur when a person's breathing is restricted from pressure exerted against the chest or the position of a person's head causes obstruction of their airway. Either of these conditions can result from a body position that interferes with breathing. Some restraint and transport positions increase the risk of positional asphyxia.

Factors Related to Positional Asphyxia

There is general agreement that certain factors increase the risk of positional asphyxia. These factors include -

Cocaine Induced Delirium - This is a side effect suffered by some cocaine users. It is characterized by disorientation, hallucinations, and an increase in heart rate.

Other drug/alcohol use - Intoxication may reduce respiratory function.

Physical Build - Obesity has been identified as a factor increasing risk of positional asphyxia.

Environment - Extreme temperatures increase risk.

Underlying Health Problems - Asthma, emphysema, and heart disease have all been implicated as factors.

(Ex. 10)

60. Although Defendant City was aware of the risks of positional asphyxia, they failed to provide adequate training to Officers or to promulgate clear policies addressed at avoiding deaths due to Positional Asphyxia. Defendant City also failed to discipline or take any corrective action against Officers whose conduct put individuals at risk of death, or caused death due to Positional Asphyxia.

61. The Officers were on notice that Plaintiff Jones was at high risk for positional asphyxia. Plaintiff Jones was obviously obese. The Officers had observed him prior to the struggle, and he exhibited signs of possible drug or alcohol use. Officer Reese admitted that during the struggle he could not tell if Plaintiff Jones was struggling to

get free or to get air. Reese Interview Tr. p. 12 (Ex. 5)

62. Defendant City's inadequate training, and policies and practices directly caused Plaintiff Jones' death.

63. Defendant Police Officers left Plaintiff lying on his stomach, unable to breathe, while they caught their breath after the prolonged struggle. Osterman Interview Tr. pp. 14-15 (Ex. 2). Even before the struggle was over, the Officers involved were visually exhausted. Reese Interview Tr. pp. 2, 5-6 (Ex. 5)

64. Several of the Officers at the scene knew that Plaintiff was not breathing, but had a pulse. Defendant Officers Slade admitted that after Plaintiff was handcuffed "He [Plaintiff] was still on his stomach after we stood up. That's when I noticed he wasn't breathing." Slade Interview Tr. p. 5 (Ex. 3). Officer Pike also knew of that handcuffed persons on their stomach might stop breathing due to positional asphyxia, and knew Plaintiff had a pulse, was unsure if he was breathing, and commented to others about the possibility that Plaintiff was not breathing. Pike Interview Tr. pp. 12, 14-15 (Ex. 1). Although Officers Slade and Pike told other Officers that Plaintiff was not breathing, all Officers just stood over Plaintiff Jones, left him laying face down with handcuffs on, and did not attempt to

begin CPR. Slade Interview Tr. p. 7 (Ex. 3); Waite Interview Tr. p. 3 (Ex. 9)

65. Defendants Abrams and Johnstone were aware that after Plaintiff was handcuffed, he had a pulse, but was not breathing. Abrams Interview Tr. p. 2. (Ex. 4); Johnstone Interview Tr. p. 5 (Ex. 8) Although Officer Pike told Defendant Abrams that Plaintiff was not breathing, he did not even look at Plaintiff's face or chest, and did not administer CPR or mouth-to-mouth resuscitation. Abrams Interview Tr. p. 7 (Ex. 4).

66. Defendant Battison, a supervisor who was called to the scene, was also aware that Plaintiff was handcuffed and not breathing, so he called for EMS. Battison Interview Tr. p. 2 (Ex. 11) He did not administer CPR or mouth-to-mouth resuscitation, and was aware that other Officers likewise were not giving Plaintiff any assistance in breathing other than rubbing his chest. *Id.* at pp. 5-7.

67. Defendant Brazile, another supervisor at the scene was aware that Plaintiff was not breathing, and was in handcuffs. He was aware that the handcuffs needed to be removed so that emergency medical care could be provided, but did not instruct anyone to remove the handcuffs, and did not see the handcuffs removed. Brazile Interview Tr. p. 7 (Ex. 12)

68. Defendant Police Officers failed to have proper equipment available to render CPR, and thus at no time did Defendant police officers attempt to administer mouth-to-mouth resuscitation leaving Plaintiff lying on the payment without respirations for several minutes, contrary to their CPR training.

69. Defendant Police Officers failed to remove the handcuffs from Plaintiff once they noticed he was not breathing, and initially refused requests by paramedics to remove the handcuffs so they could administer emergency aid. Defendant Police Officers' refusal to remove the handcuffs with knowledge of the risk that Plaintiff was suffering from Positional Asphyxia and potential for death as a result, showed callous and deliberate disregard for Plaintiff's medical needs. The handcuffs interfered with and further delayed emergency treatment, thereby ensuring and hastening Plaintiff's death.

70. Defendant Police Officers willfully, wantonly, and callously failed to provide Plaintiff with appropriate emergency medical care after inflicting injury on him and interfered with the administering of emergency care by others, with knowledge of the risk of death from Positional Asphyxia and that circumstances indicated a high likelihood that Plaintiff would and was suffering from Positional Asphyxia, and

thereby showed deliberate indifference to Plaintiff's medical needs.

71. Defendant police officers knew or should have known that their actions in using excessive force, crushing Plaintiff, spraying him with chemical irritant, and leaving Plaintiff face down on the pavement would lead to substantial serious physical harm and death.

72. The acts and omissions by the Defendants, including the initial approach and assault on Plaintiff, the brutal beating, the crushing and positional asphyxiation, were the direct and proximate cause of Plaintiff's suffering and death in violation of Plaintiff's civil rights under the laws of the United States, Constitution of the United States, and the Constitution of Ohio.

V. *FIRST CLAIM FOR RELIEF AGAINST ALL DEFENDANTS: 42 U.S.C. 1983*

73. Defendants have under color of state law deprived Plaintiff of rights, privileges and amenities secured by the United States Constitution, including inter alia, the Fourth and Fourteenth Amendment to the United States Constitution.

VI. *SECOND CLAIM OF RELIEF UNDER ORC 2125.01*

74. Defendants Abrams, Pike, Reese, Johnston, Osterman and Slade are City of Cincinnati police officers. Defendant Abrams, Pike, Reese, Johnston, Osterman and Slade are sued in their individual and official capacity. At all times relevant to this action, Defendants Abrams, Pike, Reese, Johnston, Osterman and Slade acted under color of law.

75. Defendants Adams, Harrison, Otten are City of Cincinnati firemen and are sued in their individual and official capacities. At all times relevant to this action, Defendants Adams, Harrison, and Otten acted under color of law.

76. Defendants Streicher, Wright and Lemmie are policy makers for the City of Cincinnati, and are sued in their individual and official capacities. At all times relevant to this action, Defendants Streicher, Lemmie and Wright acted under color of law.

77. The wanton or reckless acts or omissions of Defendants directly and proximately caused the death of Plaintiff and the resulting loss of support, society, services, and mental anguish due to his death.

VII. *THIRD CLAIM OF RELIEF AGAINST DEFENDANTS CITY OF CINCINNATI, DEFENDANT LEMMIE AND CHIEF STREICHER*

78. Defendants City of Cincinnati and Defendants Lemmie and Chief Streicher supervised, authorized and ratified the wrongful conduct of the Defendant police officers. Defendants' wrongful conduct was the direct result of the policies, practices and customs of these Defendants, that allowed Officers to use excessive force against citizens, and to subject persons to outrageous, unreasonable and inhuman treatment that leads to serious injury and death.

79. Defendants City of Cincinnati and Defendant Chief Streicher failed to establish adequate policies and procedures to properly train and/or supervise Defendants Abrams, Pike, Reese, Johnstone, Osterman, and Slade on the appropriate use of force, and action to take after the use of force. The acts and omissions by these Defendants were the direct and proximate cause of Plaintiff's suffering and death in violation of Plaintiff's civil rights under the laws of the United States, Constitution of the United States, and the Constitution of Ohio.

80. Defendants City of Cincinnati, Defendant Lemmie, and Defendant Chief Streicher failed to properly enforce written policies

designed to prevent the type of injury and death suffered by Plaintiff. The acts and omissions by these Defendants were the direct and proximate cause of Plaintiff's suffering and death in violation of Plaintiff's civil rights under the laws of the United States, Constitution of the United States, and the Constitution of Ohio.

81. Defendants City of Cincinnati, Defendant Lemmie and Defendant Chief Streicher fail to discipline Officers who fail to provide emergency medical care to persons injured in the course of being apprehended, and fail to provide necessary equipment to Officers to provide the most basic emergency aid, i.e. barriers for use when giving mouth-to-mouth resuscitation. The need for barriers in light of the serious risks of death from Positional Asphyxia during arrests was obvious, and the failure to provide barriers showed callous indifference to the lives of citizens. The lack of barriers directly contributed to the cause of Plaintiff's death in this case.

82. Defendants Streicher, Lemmie and the City of Cincinnati failed to discipline any of the Officers who aggressively approached Plaintiff instead of awaiting MHRT or a supervisor, and then beat, deployed chemical irritant, and crushed Plaintiff, then stood by without providing emergency medical care. Their refusal to discipline the Officers effectively acted to ratify the conduct, and further evidences the existence of pre-

existing policy and custom of allowing Officers to engage in such conduct.

83. Defendants City of Cincinnati also failed to properly train, supervise and enforce policies for the Defendant Fire Department in responding when police officers use excessive force. The failure to properly train, supervise and enforce policies for the Fire Department is directly related to and a result of the policies, practices and customs of the City of Cincinnati, Chief Streicher and the CPD, to use excessive force against citizens, and to subject persons to outrageous, unreasonable and inhuman treatment that leads to serious injury and death.

84. Defendant Slade stated with respect to positional asphyxia he received "[v]ery little training. I think it came out as a memo." Slade Interview Tr. p. 6. (Ex. 3) According to Defendants Abrams and Battison, officers were not provided with a copy of the memo, but merely signed off that they had seen it. Abrams Interview Tr. p. 5 (Ex. 4); Battison Interview Tr. p. 7 (Ex. 11); Waite Interview Tr. pp. 7-8 (Ex. 9). The CPD practice for Training Bulletins is to pass around one copy with a sign off sheet, and each officer signs after looking over the bulletin. Johnstone Interview Tr. p. 6 (Ex. 8)

85. Defendant City also inadequately trained Officers to provide CPR. Defendant City was aware of the risk that persons they would

try to apprehend might stopped breathing due to positional asphyxia, or other reasons, and thus included CPR training in the curriculum for new officer. As evidenced by the November 3, 2004 memo from Valerie Lemmie, City Manager, Defendant City's training program was inadequate in that police officers were only given CPR training during recruit training, but necessary periodic follow-up training to keep them certified was never provided. Due to this inadequate training, police officers were not qualified to provide CPR to Plaintiff Nathaniel Jones. Lemmie 11/3/04 Memo (Ex. 13); Reese Interview Tr. p. 13 (Ex. 5)

86. Defendant City also failed to provide needed equipment for officers to administer CPR. *Id.* p. 4

87. Defendant City also failed to provide adequate policies and training for dealing with subjects with possible mental health issues until a MHRT arrives on the scene. Officers who respond to a call may request a MHRT, but are left to handle the scene as best as possible until a MHRT arrives. Reese Interview Tr. p. 9 (Ex. 5) They are not adequately trained how to deal with combative subjects with mental health issues who begin to close the reactionary gap before MHRT has time to arrive, thus Officers are forced to take whatever actions they deem appropriate to protect themselves and others. *Id.* at p. 10

88. Defendant City also fails to train a sufficient number of Officers to respond to calls where there are mental health issues, thus response to calls for MHRT are delayed. Schulte Interview Tr. pp. 2, 9-10 (Ex. 14)

VIII. *FOURTH CLAIM OF RELIEF AGAINST DEFENDANT FIREMEN FOR GROSS NEGLIGENCE.*

89. Defendant Fire personnel are employees of a political subdivision, the Defendant City of Cincinnati.

90. Plaintiff suffered damages and injuries resulting from the performance of Defendant's governmental function.

91. Defendant Fire personnel's lack of treatment administered to Plaintiff constitutes willful and/or wanton misconduct.

92. Defendant Firemen were called to the scene to provide medical assistance to Plaintiff. Defendant Fireman Adams observed Plaintiff dancing around and yelling, and decided that Plaintiff did not need medical assistance even though when they were first called it was reported that Plaintiff was unconscious, and no one had attempted to talk to Plaintiff to determine if he wanted medical assistance.

93. Defendant Adams made the decision that Police were needed even though no one at

White Castle was complaining about Plaintiff's behavior. Defendant Adams called the Police. Adams Interview Tr. p. 5 (Ex. 15)

94. Defendant Fire personnel intentionally failed to do that which should have been done. Defendant Fire personnel knew or should have known that the conduct of Defendant police officers in using their PR-24s severely on the Plaintiff would probably or likely cause injury to Plaintiff.

95. Defendant Firemen Adams and Otten watched the struggle between Plaintiff and Police Officers, saw the Officers strike Plaintiff continuously with PR-24s, saw Officers spray Plaintiff with chemical irritant.

96. Defendant Fireman Harrison, based on his eighteen years of experience as a fireman, expected that the Police Officers were going to seriously injure Plaintiff, and intentionally got on the truck, looked away, and drove off because he did not want to become involved. Harrison Interview Tr. p. 11 (Ex. 16)

97. Defendant Fire personnel intentionally disregarded their clear duty by leaving the scene of the incident with the full knowledge of the likelihood of resulting injury to Plaintiff. Defendant Adams, who was acting supervisor for the firemen at the scene, made the decision to leave after witnessing

the beating of Plaintiff Jones. Adams Interview Tr. p. 16 (Ex. 15)

98. Defendant Fire personnel watched the beating and therefore had knowledge of the surrounding circumstances and existing conditions, and likelihood of Plaintiff suffering Positional Asphyxia that would require immediate medical care.

99. Defendant Fire personnel failed to care for the Plaintiff and were indifferent to the consequences when the probable harm to Plaintiff from their failure was great.

100. Upon return to the scene, Defendant Fire personnel failed to provide appropriate emergency medical care to resuscitate Plaintiff whose heart had stopped and who was not breathing. On information and belief, Defendant firemen only briefly performed CPR, and discontinued efforts to revive Plaintiff shortly after they returned to the scene believing that Plaintiff was beyond resuscitation. Their failure to conduct ongoing resuscitative care constitutes gross negligence and ensured Plaintiff's death.

101. Plaintiff suffered loss of life as a result of Defendant Fire Department and Defendant Firefighter's conduct.

IX. *FIFTH CLAIM FOR RELIEF: ALL PLAINTIFFS AGAINST ALL DEFENDANTS: LOST OF CONSORTIUM.*

102. As a direct and proximate result of Defendants acts and/or omissions, Plaintiff's family has suffered loss of society, companionship, comfort, love, and solace.

IX. *PRAYER FOR RELIEF*

WHEREFORE, Plaintiff prays this Court:

A. Award Plaintiff compensatory damages against all Defendants in an amount to be proven at trial, including but not limited to pain and suffering of the deceased;

B. Award Plaintiff punitive damages for the civil rights claim against the individual Defendants in an amount to be proven at trial;

C. Award Plaintiff's reasonable funeral and burial expenses incurred as a result of his wrongful death;

D. Award Plaintiff his reasonable attorney's fees pursuant to 42 U.S.C. 1988;

E. Declare Defendants' action unconstitutional and enjoin Defendants from the unconstitutional violations complained of herein.

F. Grant Plaintiff a trial by jury; and

G. Grant such other relief as may be just and equitable.

Respectfully submitted,

s/Kenneth L. Lawson (0042468)
Tamara R. Parker (0077207)
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JURY DEMAND

Plaintiff demands a trial by jury on all issues.

Exhibit 1

C C A COMPLAINT #03513

Q = Ken Jones
QQ = David Moonitz
A = Police Officer James Pike

[p.1]

Today's date is June 24, 2004. Time is approximately 7:50 a.m. I'm CCA investigator Ken Glenn, here with CCA investigator Dave Moonitz. And, we're here with Police Officer James Pike and FOP attorney Steve Lazarus.

Q: Officer Pike, you read your Advice of Rights. You understand your Advice to Rights, you signed them. Is that correct?

A: That is correct.

Q: I'd like to start off with – can you give me your date of hire, and your assignment date – and your assignment on that particular day – on November 3?

A: My date of hire was January, 1996, when (inaudible) I think January 14, something around there.

Q: OK. This is the incident that occurred on November 30, 2003, approximately at 6:00 a.m. at the White Castle parking lot located at 64 Mitchell Ave. regarding Mr. Nathaniel Jones.

Uhm, Officer Pike, can you tell me, in your own words, how you happened to arrive at that particular location and what happened when you got there and what you observed?

A: It was a radio run and request from the Fire Department that the Police respond for a disorderly subject. So, I responded to that radio run, to the White Castles [sic]. When I arrived at the White Castles, I observed Mr. Jones, uhm, looked like he was walking in front of the restaurant to the corner of the parking lot. I could see him making some motions and gestures. I thought at first that maybe he was

* * *

[p.3]

And, uhm, he must have heard me tell Mr. Jones to back up because Mr. Jones didn't back up and Officer Osterman told him, "Sir, you need to back up." And, he said, "Who the fuck is you?" And Officer Osterman replied, "Cincinnati Police. That's who the fuck I am." And that response seemed to work. It got his attention because he had – his head startled look on his face. Then, he backed up and uhm, seemed like he was kinda compliant for just a few seconds.

And, uhm, then he started becoming aggressive again. And, he stated, uh, "I don't give a fuck who you is, you better get the fuck out of here." And, my opinion of him during this changed from an MHRT person to someone who

I thought was under the influence of some type of drug. I thought it was probably crack cocaine. And, uh, so, at this point, I sensed that things were – had the potential for becoming, uhm, volatile. I thought he might become agitated.

So, I flipped on the MVR from the microphone on my belt and I also requested a supervisor respond with a Taser. I also at this point moved further to my right. There was a car that was parked there, and he was at more or less the front of the car, and I was at maybe a little beyond the rear of the car. So, I moved further to the right, which would put me in an opposite corner of the vehicle from him. Just to increase the distance and give me some type of barrier between us.

Officer Osterman went towards the rear of his car, and I was just thinking then he was probably going to come up on the other side of his car. So, that there was a separation between him and Mr. Jones. Mr. Jones, he just started, I – I don't know what he was saying, he just started going into a tirade. He's yelling

* * *

[p.5]

Officer Osterman had rejoined me and was engaged with Mr. Jones. That's the point that we come back into view of my MVR.

We all go to the ground and uhm, now it becomes a ground fight. I tell Mr. Jones to put his hands behind his back and I take out my PR-24. I tell him again to put his hands behind his back. He does not comply – does not make any attempt to comply. He continues to fight with Officer Osterman, and uhm, I began to administer PR-24 jabs to the, uhm, upper part of the back muscle area of the back. It's was done in an attempt to gain some pain compliance. That doesn't work, he never even, it doesn't appear to me that he even acknowledges the strikes. Uhm, I continue giving verbal commands, which he continues to ignore. And, uhm, I continue to give PR-24 strikes. Officer Osterman gives him PR-24 strikes. At one point, he, uh, grabs my PR-24 and he's up on his knees. He had it with his left hand, and uhm, I thought at this point, that maybe I could use the PR-24 for leverage to get his left arm back. I thought if I could get his arm – his left arm back, you know, we could get him back to the ground. We might be able to get him handcuffed from there.

But, I can never get his arm back. I think at this point, this is the second time that we go to the ground. He ends up on his back. Officer Osterman ends up on top of him; they're face-to-face. That, to me, was a very bad position for Officer Osterman to be in. Face-to-face with his hands, uhm, moving, it was too much accessibility to, uhm, weapons, his weapon, other items on his gun belt, uhm, his face, throat, those type of things.

[p.6]

So, I was trying to keep him from grabbing at anything, and at this point, uhm, Mr. Jones grabbed my PR-24 the second time. And, so now, I'm in a struggle with him again over my PR-24 for the second time. I was able to get my PR-24 away from him the second time. The struggle continues, uhm. Other cars start to arrive. Officer Abrams is the first to arrive, then Officer Slade. Officer Abrams runs around to one side and grabs one of his arms, his left arm, trying to get his left arm back.

Officer Slade, I don't recall his exact wording, I don't know if he said, "Has he been maced or sprayed?" I'm not really sure what he said – something to that effect. Both Osterman and I said, "Yes." And then, he said something like, let me try pepper. So, he yells, "Pepper," and he sprays him with the pepper spray. That had no effect, uhm, at this point, I'm trying to get a handcuff on his right arm. And, I think by this point, Officer Reese and Officer Johnstone had arrived. And, they were trying to gain pain compliance by using PR-24 on his shins. And, I had hold of his right arm, and I was to his right side. I was able to get a handcuff on his right arm, and they were trying to get a handcuff on his left arm and get his left arm back.

We needed another set of cuffs. I believe it was Officer Reese who pulled out his set of cuffs, so his cuffs were hoOKed to mine. We're still waiting for the left arm to come back. They

were having difficulty in having his arm back. Somebody, I'm not sure who, said, "We need another set of cuffs." I said, "We don't need another set of cuffs." We just need to get arm back the right way. So,

[p.7]

then they were finally able to get his arm back, swung around the correct way, and that's when we were able to get him handcuffed. Completed the handcuffing.

Q: I'd like to start from there and we're gonna back up, but I'm going to go from that point. At the point that handcuffing was completed, what was your immediate next step?

A: My immediate next step was I stood up and kinda, I was exhausted and uhm, so I just kinda caught my breath for a second. I believe it was Officer Slade who said, "We gotta get him rolled," so we rolled him over to his back. As he was, we were rolling him, as I started rolling him on his back, uhm, I knew there was a fire company there, so I said, have fire come over to take a look at him. That was done as a precautionary thing. Then, once I got him on his back, I looked at him and noticed that it appeared to me he was unconscious and unresponsive. So, I checked him for a pulse. And, he had a good strong pulse. So, I was comfortable with that – that he had a good strong pulse. And, uhm, but I couldn't see him breathing, but he was so big I wasn't sure

whether I was able to see him breathing. So, uhm, I checked him again for a pulse, he still had a pulse, and am waiting for the fire company to come over and look at him.

Then, there's some conversation about where's the fire company. And, uhm, I had no idea, none whatsoever, that they had left during the struggle. And, so I didn't realize that we were having to call them back for them to return. So, the call was made for the Fire company return and have them expedite and uhm, Officer Reese was, uhm, monitoring, or at least he appeared to be monitoring. He was bent over talking to him and uhm, fire company returned and they didn't

* * *

[p.12]

QQ: Do you know how many times you struck Mr. Jones?

A: No, I do not.

QQ: Do you know how many times Officer Osterman struck him?

A: No, I do not.

QQ: Were there any other officers present that you observed or can remember that also struck Mr. Jones with the PR-24 baton?

A: I don't know of any other strikes.

Q: We're back on tape. We had to change the FOP tape over and there was no conversation when we were off tape, is that correct, officer?

A: That's correct.

QQ: Are you familiar with the positional asphyxia?

A: I recall there was some discussion about it in roll call training.

QQ: When, can you recall?

A: I don't know when. It was some time ago.

QQ: Do you recall what you were instructed about as this relates to that?

A: I think basically the gist of what they were stressing was not to leave people on their stomach. Not to leave handcuffed prisoners on their stomach.

QQ: OK. When the Fire Department arrived to return, you were still standing near Mr. Jones?

A: When the Fire Department arrived?

QQ: Yes.

A: If I recall at that point, I was engaged in a conversation with a supervisor, he was, uhm,

checking on my injuries. Asking about my injuries.

* * *

[p.14]

QQ: Uhm, getting back to Mr. Jones again, uhm, you were there after he was handcuffed, he was still on his stomach. Were you there when he was rolled over?

A: Yes.

QQ: You said that you did detect a pulse?

A: Yes.

QQ: But, you couldn't tell if he was actually breathing.

A: That's correct.

QQ: Did you see any liquid or any type of substance coming from his nose or mouth area?

A: I did not see anything from his nose, uhm. It looked like maybe it was just a very small amount of, uhm, I don't know if it was stomach fluid or vomit, or what it was, in the very corner of his mouth, just a very small amount.

QQ: Uhm, do you recall if his eyes were open at that time or closed?

A: His eyes were open.

QQ: Did he appear, was he moving his eyes at that time? Do you recall?

A: I don't recall that.

Q: Did anybody attempt to verbally communicate with him at that time?

A: Yes, I did.

QQ: And, was he responsive or not?

A: He was not.

QQ: Do you recall, were you present when somebody stated they didn't believe he was breathing?

[p.15]

A: The only – the only thing I recall is what I said. Was that I don't see him breathing.

QQ: And, uhm, at what point, if you can recall, that Officer Reese begins to do chest compressions or sternum rubs?

A: It seemed like there was relatively quick. I was still there at his side, when Officer Reese came over. I had been talking to him. And Officer Reese came over. And, uh, like I said, he was kind of monitoring him.

QQ: From that point, how long were you in the presence of Mr. Jones before you removed yourself from him?

A: Uh, I don't know the answer to that. I don't recall that.

QQ: Did you say earlier, I believe, that from Mr. Jones you went about the task of putting up barricade tape?

A: Before I started putting up crime tape, I said a supervisor engaged me in conversation about injuries.

QQ: OK.

Q: As the handcuffing process was taking place, where were you positioned at?

A: I was along his right side.

Q: When you say along his right side, was you on the ground, on your knees?

What position were you in?

A: I was kneeling on the ground.

Q: During this process, throughout the handcuffing process, did you ever observe any of the officers, any parts of their bodies on position on Mr. Jones' back area?

A: No, I did not.

* * *

Exhibit 2

C C A COMPLAINT #03513

Q = Ken Glenn
QQ = Dave Moonitz
A = Police Officer Baron Osterman
AA = Police Officer Terry Peirano

[p.1]

This is June 22, 2004. The time is approximately 7:30 a.m. I'm CCA investigator Ken Glenn here with CCA investigator Dave Moonitz and we're here with Police Officer Baron Osterman and his FOP rep Police Officer Terry Peirano. And, that's spelled P-E-I-R-A-N-O.

Q: Officer Osterman, you read your Advice to Rights. And, you understand your Advice to Rights, you signed them, is that correct?

A: Yes.

Q: OK. I'd like to start off with – can you give me your date of hire and date of birth, please?

A: Date of birth is [REDACTED] - 71. Date of hire was, uh, August, I believe the 18th or 19th, two years ago, 2002.

Q: And, on the date of November 30, 2003, can you tell me what your assignment was?

A: I was assigned District 5, Beat 2, uniform patrol.

Q: And, were you in a marked police vehicle?

A: Yes.

Q: OK. I'd like to go back to that particular day at White Castle Restaurant located at approximately – it was 64 West Mitchell. Can you tell me, uhm, how you happened to arrive at that location and when you arrived at that location, what happened?

A: We were dispatched there. Fire had originally been called to the scene on a medical run – person down, I believe. Uhm, we were called to the scene for apparently,

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[p.6]

Q: And, when you went to the ground, what – did Jones go face down? Did he go on his side? On his back? How did he go to the ground?

A: I believe he was pretty much on his hands and knees. When I – uh – I initially ran up – when the the fight started, I ran up the first time, I could smell – I could taste the – mace in the air that Officer Pike had used. When Mr. Jones hit Officer Pike, uhm, Jim dropped – dropped his can of mace on the ground. When we fell to the ground, I saw – I remember seeing the can of mace was laying there. I grabbed it and threw it out of the way, so that, uh, Mr. Jones wasn't able to get a hold of that.

But, when we initially went to the ground, I'm pretty sure he was on his hands and knees and I was pretty much laying on top of him. Once we went to the ground, uhm, we had, myself and Officer Pike had a little bit of an advantage. (Inaudible). I wanted to keep him down on the ground so he couldn't get back up and fight again.

Q: Was he still fighting you said when he was in a position of being on his hands and knees? Was he fighting at that point?

A: He was struggling, yes.

Q: And, what were you attempting to do? What did you do at that point? As he's on his hands and knees, and he's on the ground?

A: Uhm, initially, basically all I wanted to do was I just wanted to keep him down so I was just trying to hold him down on the ground.

Q: OK. So, at that point, you said you administered three blows to the leg area?

A: Yes.

* * *

[p.14]

A: Uhm, you know, they were struggling to get his hands behind his back. So, he's, yeah, he's still resisting --

Q: And was there a point where he stopped resisting? Was it at the point when he was completely handcuffed?

A: I don't recall exactly which second he no longer resisted.

Q: Were – what position were you in during the handcuffing process?

A: I was by his right shoulder.

Q: Was there any officers' knees or body in his back area?

A: No.

Q: After the handcuffing process was concluded, what was your first reaction? What did you do?

A: Same thing all of us do. We all stood up and took a breath.

Q: What position was Mr. Jones in at that time?

A: We had just handcuffed him; he was more or less face down, in a prone position. Did you observe any signs that he was breathing at that particular point?

A: I didn't really look, to be honest with you.

Q: And, you said that you didn't look.

A: Not when I first stood up, no.

Q: And, when you stood up, you said all the officers stood up.

A: Everybody stood up and took a step back. Like I said, we had been involved in a pretty good fight for roughly a minute and a half, two minutes. If I had to guess, I don't know what the exact time frame is. Uhm, we're all out of breath. We stood up, kinda inhaled deep, relaxed for a second and then roughly that was when

[p.15]

Tommy Slade said, "Should we roll him over to his back?" or something along those lines. Or "Shouldn't we roll him over?" I think is what he said.

Q: And, then what was your steps then? What did you do?

A: He was rolled over. To be honest with you, I don't remember if I helped roll him over or not. Uhm, but it was right after he was rolled over, when I noticed that it didn't appear as though he was breathing. Or, at least, he was not conscious.

Q: Is that the point when you went to get your first aid kit?

A: That was the point when I checked for a pulse. And then after I checked for a pulse, I went to get the first aid kit.

Q: Once the Fire Department arrived back on the scene, where were you at?

A: When they arrived?

Q: Right.

A: When they arrived, I was – I was kneeling on the ground at Mr. Jones' head looking through the first aid kit for the breathing barrier.

Q: Mr. Jones, what position was he in at that time?

A: He was on his back because we were getting ready to begin CPR.

Q: Was he still handcuffed?

A: Yes.

Q: Once the Fire Department arrived and came to his aid, did they request that the handcuffs be removed?

A: I don't know. They didn't request it from me.

Q: You didn't hear a general statement from any of the firefighters requesting that the handcuffs be removed?

* * *

Exhibit 3

C C A COMPLAINT #03513

Q = Ken Glenn
QQ = Dave Moonitz
A = Police Officer Thomas Slade
AA = Police Officer Terry Peirano

[p.1]

This is June 22, 2004. I'm CCA investigator Ken Glenn, here with CCA investigator Dave Moonitz. And, we're here with Police Officer Thomas Slade and his FOP rep, Police Officer Terry Peirano. The time is approximately 9:05 a.m. We're in the office of Citizen Complaint Authority, and we're going to discuss CCA #03513. This is a death in custody of Mr. Nathaniel Jones that occurred on November 30, 2003, at approximately 6:00 a.m. at 64 W. Mitchell in the parking lot of the White Castle restaurant.

Q: Officer Slade, you read your Advice to Rights. You understand your rights and you understand them. Is that correct?

A: That's correct.

Q: I'd like to go back to the date in question of November 30, 2003. And, can you tell me how you happened to arrive at that particular location?

A: There was a call for help from Officer Pike and uhm, I was driving that night. Officer Abrams

was my partner. We drove to the scene there at White Castles [sic].

Q: And, when you got there, what did you observe?

A: Uhm, when I pulled around the corner, there, I made a left turn on to Kessler. Uhm, I observed there was a gentleman, later known as Nathaniel Jones to me, on his hands and knees on the ground. Uhm, and Officer Osterman, uhm, was giving some baton strikes to his buttocks area.

Q: And, what was Mr. Jones doing you said as he was on his hands and knees?

[p.2]

A: He was just on his hands and knees is what I could see. I couldn't hear anything because the windows weren't open and stuff, and I was just pulling into the street right there.

Q: Okay. You said you couldn't hear anything, but did you see anything anything that Mr. Jones was doing?

A: He was just on his hands and knees is all I saw at that point.

Q: And, once you pulled up, what was your actions from that point?

A: Uhm, we had pulled up, and they were, uhm, trying to get the gentleman to put his hands

behind his back, and I had asked if he had been maced. They said yes with CS. And that's when I gave him a one-second burst between the eyes with pepper mace.

Q: What was his reaction when you did that?

A: Uhm, he looked at me right before I maced him and uhm, there was really no reaction from him. It had no effect.

Q: So, what did you do from there?

A: At that point, I went around and was going to put a, it's called a, shin pressure, with a PR-24 on his left shin. I was actually going to try to use both shins, because he was kinda heavyset gentleman. I couldn't get both shins, I could only do one shin with a shin hold.

Q: What position was he in at that time?

A: At that time, he was on the ground face down.

Q: Okay. What was he doing – what was his response to the – what you did to him?

A: It had no effect.

[p.3]

Q: And, what did you do from there?

A: I, uh, I applied the pressure point and Officer Reese showed up, and I told him to go ahead

and take the right leg and do the right shin hold for pressure.

Q: And, what was his reaction to that?

A: Still had no effect.

Q: At some point, there was a handcuffing process. Were you involved in that handcuffing process?

A: I was using the shin, the shin hold, while the officers in the front were trying to, on top, were trying to handcuff him.

Q: So, you actually was not involved in the actual handcuffing.

A: I was, like I said, I was doing the shin hold.

Q: Okay.

A: That's all I was doing at that point. It was Officers Abrams, Johnstone, Osterman, Pike were trying to handcuff him.

Q: Was there some point when that handcuffing process was complete, what did you do?

A: After he was handcuffed, I stood up along with all the other officers.

Q: What position was Mr. Jones in as you stood up?

A: He was still on his stomach after we stood up. That's when I noticed he wasn't breathing.

Q: What period of a time was that from the time you stood up that you noticed he wasn't breathing?

A: It was like seconds. It wasn't long at all.

[p.4]

Q: Was there – what did you do at that particular time, when you noticed he wasn't breathing, what was your reaction?

A: Uhm, I was kinda like in shock.

Q: Did you say anything?

A: Like I said, I said I noticed he wasn't breathing. It wasn't me, but someone asked about where the Fire Company was.

Q: Okay. But still, at that particular point, he's still laying down handcuffed on his stomach?

A: Uhm, just for a few seconds. It was a sergeant actually rolling him over on his side.

Q: And, what did you do?

A: Uhm, they rolled him over on his side.

Q: Did you assist them in rolling him over?

A: I don't believe so, no.

Q: And, once they rolled him over, what happened?

A: They tried to take a pulse. Officer Pike did.

Q: And, what happened after Pike took the pulse?

A: He said you get a faint pulse, and Officer Reese started the chest massage. And Osterman went to the car to get the medical kit.

Q: Okay. I'd like to back up to when you first pulled up and you said you saw Officer Pike administering PR-24 strikes.

A: No, Osterman.

[p.5]

Q: Osterman. Excuse me, I'm sorry, Osterman. Do you recall where those strikes were landing at?

A: His right buttocks.

Q: Okay. Do you recall how many you observed?

A: I only observed two.

Q: Did you at any time administer any PR-24 strikes?

A: Not strikes, no.

Q: Dave.

QQ: Do you recall who the sergeant was who said to roll (inaudible)?

A: Sgt. Battison.

QQ: Did you observe Mr. Jones' face at all when he was rolled over?

A: I can see his face.

QQ: Were his eyes opened?

A: I don't recall.

QQ: Did you notice any fluid or anything exuding from his mouth or nose?

A: I don't recall any, no.

QQ: And, uhm, do you recall if Officer Pike, when he tried to take the pulse, was it a carotid pulse or brachial pulse?

A: I couldn't tell you, offhand. I'm not really sure. I just heard as soon as he got a faint pulse.

QQ: And then you say, Officer Osterman retrieved the first aid kit from his vehicle?

A: He went to his car to get a first aid kit, yes.

* * *

[p.7]

compressions, did any other officers – did you or any other officers take any type of action in terms of CPR or any type of action?

A: No.

Q: You said that you were familiar with positional asphyxia. Is it normal that when training bulletins come out, that there is a training session at roll call regarding that particular bulletin?

A: It's read off at roll call.

Q: Okay.

A: If that's what you mean by training.

Q: Right.

A: Yes

Q: And, is that discussed? Is there a discussion that the –

A: Some of the training bulletins, there can be discussions, yes. Some, there may not be any discussion.

Q: Okay. You never received a copy of this particular Training Bulletin 2003/1 regarding positional asphyxia?

A: I don't recall if I did or not. It's probably in the staff notes.

Q: Okay. Dave, do you have anything else?

QQ: When you noticed Mr. Jones was not breathing, did you make the other officers aware of that? Did you say he's not breathing?

A: Yes. Yes, that's when they rolled him over, and Officer Pike tried to get a pulse.

QQ: Do you recall at what point the handcuffs were taken off of Mr. Jones?

A: I – I don't recall. I believe they were on him when he left for the hospital.

* * *

Exhibit 4

C C A COMPLAINT #03513

Q = Ken Glenn
QQ = Dave Moonitz
A = Officer Guy Abrams
AA = Officer Terry Peirano

[p.1]

It is approximately 8:20 a.m. I'm CCA investigator Ken Glenn here with CCA investigator Dave Moonitz. And, we're here with Police Officer Guy Abrams and his FOP rep, Police Officer Terry Peirano.

Q: Officer Abrams, you read your Advice to Rights. And, you understand and you've sign them, is that correct?

A: Correct, sir.

Q: Uh, this is CCA case #03513. This is a death in custody of Mr. Nathaniel Jones, that occurred on November 30, 2003 at approximately 6:00 a.m. at the White Castle restaurant at 64 West Mitchell Ave. Officer Abrams, I'd like to start off with you telling us what happened and how you happened to arrive at that location.

A: Uh, there was a radio run, uhm, at the White Castle. I believe it came out as disorderly. Our personnel went down as fire; Fire had disorderly person. Uhm, Officer Pike got dispatched on the run, uhm, me and my partner

at the time was up on Este Ave. Uhm, Officer Pike said, "Change run to a MHRT run," and he was asking for a boss with a taser. Uhm, at that time, uhm, my partner was driving, started going down there, we got right at West Mitchell and Spring Grove. The assistance came out.

Q: Can I stop you right there? You keep referencing your partner. Who was your partner on that day?

A: Officer Tom Slade.

[p.2]

Q: OK. Go ahead.

A: We proceeded down Mitchell, right there at Kessler and Mitchell, pulled on Kessler. At that time, Pike and Osterman, got in an altercation with, as we know now, Nathaniel Jones. Uhm, at that time, I got out of the car. He was on the ground. I had my stick in my hand. At that time, I did use a small (inaudible) of my PR-24 on Mr. Jones' left side, one time, to get his arm out. I was getting his arm out.

At the same time, Officer Slade was doing a leg press with the PR-24 on the shins to Mr. Jones trying to get him to comply. Uh, I slid, because the PR-24 was held, I had his arm out, he kept trying to grab it, so I slid my PR-24 out to the side. At that time, we had his arm coming back, but we had it in a position where we

couldn't cuff, because it was coming the wrong way over his head.

Uhm, at that time, they had one handcuff on and then, uh, I believe it was myself and John, Officer John Stone, and a St. Bernard officer, we grabbed his hand off and we said on the count of three, we turned it back the right way, so we could get it cuffed. At that time, we got it – him cuffed, uhm, stood up, uhm, we rolled Mr. Nathaniel Jones over on his back. I'm trying to think of what was said, and I can't recall. Uhm, and then uhm, Pike reached down. I got a pulse, but he's not breathing, uhm, we was looking for Fire. Fire left. We started it. Fire was there on the scene. No one even knew it that Fire had left.

Uhm, we placed him on his side. Uhm, we're asking for Fire to expedite back to the location. Uhm, Joehonny was rubbing on his – Officer Reese was rubbing on his chest, right here. Uhm, Osterman went back to the police car; he

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[p.5]

Q: Are you familiar with positional asphyxia?

A: In my – from what I've seen and heard, I mean, from being overweight and laying on your stomach, or whatever.

Q: Have you had any sort of training reference positional asphyxia?

A: I believe it came out in like staff notes one time.

Q: Have you received any training regarding Training Bulletin 2003-01?

A: It was probably, sir.

Q: Are training bulletins normally discussed at roll call?

A: Uh, we have roll call training based on when the staff notes come out. It comes out at roll call. Sign off, go through, get what you can and then also sergeant goes over, highlights also of it.

Q: So, you get a copy of training bulletin?

A: We don't get a copy of it; we just sign off on it.

Q: What do you mean by sign off on it?

A: There's a check off list to make sure everyone's seen it.

Q: Is – is a copy of those training bulletins available to you?

A: Probably in the captain's office, yes, sir.

Q: Once the firemen arrived on scene, do you recall one of the firemen requesting that one of the handcuffs be removed?

A: Yes, sir.

Q: And, what happened when they requested that the handcuffs be removed?

A: Uhm, I believe I was standing right there. Uhm, I was like, we just got the handcuffs on. They said, we need to get them off to treat him.

* * *

[p.7]

QQ: After he was rolled over, did you observe his face at all?

A: I didn't go down by his face, sir. I was with him for Fire, first, after they said he wasn't breathing. But, Pike said he had a pulse.

QQ: You didn't observe his face then after he was rolled over?

A: Uh, no. I can't really say I was looking at his face, sir.

QQ: Did you possibly observe his chest or thoracic area?

A: Just, turn him over. Like I said, we rolled him on his side, and Officer Reese was rubbing on his chest.

QQ: You didn't notice whether he was into expansion and contraction through the diaphragm of the chest area while he was on his back?

A: I could not tell, sir.

QQ: You didn't observe whether his eyes were open or closed, if he had any mucus or other substances coming out of his mouth or nose?

A: No, I don't believe so, sir.

QQ: If you can recall, in training that you have received from positional asphyxia, do you recall what the recommended prevention to that syndrome is recommended?

A: The prevention for it? Uhm, don't keep someone on their stomach.

QQ: Is there anything you saw during this incident after, of course, your arrival that in retrospect you think you could have possibly been handled in a different manner?

A: No, sir.

QQ: What about training – training, do you believe you received adequate training to handle these types of situations?

A: Yes, sir.

[p.8]

QQ: Do you have any recommendations for the training unit that could enhance your abilities, not individually, but overall as a department to prevent this type of thing?

A: No, sir.

QQ: You're familiar with your tactical patrol guide?

A: Yes, sir.

QQ: Do you think that's this type of thing is adequately covered in that publication?

A: Yeah, most probably. I mean I –

QQ: You don't have it memorized.

A: Right.

QQ: Uhm, additionally, I want to touch on the use of force procedure. Do you think at any time that force could have been de-escalated or the officers had an opportunity to actually break away from Mr. Jones prior to getting him handcuffed?

A: No, sir.

QQ: Ken.

Q: What sort of training have you received regarding the use of PR-24?

A: I had a class in the Academy. Basically, they went over PR-24 usage throughout the PT sessions. There are 24 weeks in the Academy and different strokes and jabs. And, the (inaudible) chart on, uhm, injured (inaudible) compliance, hurt and injured, fatal blows.

Q: In regarding that training, what sort of a blow did you administer? You said you administered one strike, correct?

* * *

Exhibit 5

C C A COMPLAINT #03513

Q = Ken Glenn
QQ = Dave Moonitz
A = Police Officer Joehonny Reese
AA = FOP Rep Brian Norris

[p.1]

This is June 23, 2004; the time is approximately 7:35 a.m. I'm CCA investigator Ken Glenn here with CCA investigator Dave Moonitz. We're here with Police Officer Joehonny Reese and his FOP rep Sgt. Brian Norris.

Q: Officer Reese, you've read the Advice of Rights and you understand and sign your rights, is that correct?

A: That is correct, sir.

Q: Okay. I'd like to start off with – can you give me your present assignment, uhm, when you came on the job, and your date of birth, please?

A: Uh, yes, I'm presently at District 5, Patrol Bureau. My date of employment was 7/13 of 1998. And my badge is P669.

Q: Okay. I'd like to go back to the date of November 30, 2003. What was your assignment on that date?

A: Regular patrol.

Q: And, was that at District 5?

A: That's correct, sir.

Q: And, can you tell me, uhm, at approximately 6:00 a.m., uhm, were you – how did you arrive at the White Castle Restaurant located at 64 W. Mitchell?

A: I heard the "officer needs assistance" call come out and responded there from the area (inaudible) of Spring Grove.

[p.2]

Q: And, I would like for you just to, in your own words, from the time that you arrived on the scene, tell me what happened, what you saw and what you did.

A: On the date in question, uh, I heard the "officer needs assistance" call come out. It was around 6:00 – 6:01 in the morning. I was getting ready to finish up my paperwork and secure for the night. Uhm, I responded immediately to the White Castles lot on Mitchell. Uhm, I guess it took maybe a minute to get there. Upon arriving on the scene, I seen several officers struggling with Mr. Jones trying to put him in custody.

Uhm, Mr. Jones was lying on the ground on his stomach or chest. They had one hand secured in a handcuff, which would have been

his right. His left hand was still free; he was still struggling. When I arrived on scene, I noticed the officers, uhm, Baron, Osterman and James Pike – they looked visually exhausted. Officer Tom Slade was restraining what would have been Mr. Jones' left, uhm, left leg with a PR-24 shin restraint. Officer Abrams and Pike were attempting to try to put Mr. Jones' left hand behind his back to get him handcuffed.

QQ: Pike and who?

A: I believe it was Pike and Guy Abrams. Officer Jay Johnstone, I don't remember if he got there right before me or right after me, but he was holding Mr. Jones' right arm behind him, so when they made the connection with the left arm, they put him in handcuffs. Uhm, immediately, when I got on scene, Officer Slade requested that I put his other leg in a PR-24 shin restraint, uhm, to try to keep him subdued. I did, in fact, do so. After maybe several more I don't know 10,

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[p.5]

Q: Did you observe as they were attempting to handcuff him, what was the position of the officers as they were attempting to handcuff him? Let me rephrase that, to make it easier for you.

A: Yes, sir.

Q: Were there any officers, any part of the officers' bodies on Mr. Jones' back area?

A: No, sir. No, sir. Uhm, as I stated before, I was securing, uhm, Mr. Jones' right leg, which would have been his shin since he was laying on his stomach. Officer Slade was right next to me securing his left leg. Officer Abrams and Pike were attempting to get his left, uhm, arm behind his back. I believe it was Officer Jay Johnstone that had his right arm already behind and handcuffed.

Q: At that point, what was he doing?

A: Mr. Jones?

Q: Right.

A: Mr. Jones was still struggling at this time. I remember that they were trying to get his left hand behind his back. And, they were trying with, I believe, everything that they had.

Q: Approximately how long were you there – let me rephrase that, once he was handcuffed, what did all the officers do? Once he was completely handcuffed, what happened after that?

A: After he was handcuffed, I believe – everyone just leaned back. Everybody immediately let go of Mr. Jones and stood up. Uhm, as I was telling you, I noticed that Officer Pike and Officer Osterman were physically spent. Uhm,

[p.6]

they looked glassy eyed; they were tired; they were done. They were helping once we all were there trying to get him handcuffed, but it was more so of the final four that responded that actually were successful in getting him handcuffed.

Q: Are you familiar with positional asphyxia?

A: No, sir.

Q: You're not. Let me ask you this question. Have you – has Training Bulletin 2003/1 ever been discussed with you at roll call?

A: When you say positional asphyxia, you mean, someone being held, uhm, for too long a time in one place, or –

Q: Losing, not being able to breathe because of a number of conditions.

A: Yes, sir. Yes, sir. Yes, sir.

Q: Have you – back to the question, have you been trained on Training Bulletin 2003/1 that came out on February, of '03?

A: Yes, sir. It was read in roll call.

Q: Okay. Were you provided with a copy of that particular Training Bulletin?

A: Yes, sir.

Q: Did Mr. Jones, once he was handcuffed, did he show any signs of positional asphyxia to you?

A: At the time, no.

Q: What does the Training Bulletin say that once a person has been controlled, they may be suffering from positional asphyxia – should happen?

A: I don't have that paperwork in front of me, sir. I can't read it to you verbatim.

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[p.9]

QQ: As you, after you, before or any time in the proximity of the "officer needs assistance run," did you hear a call for an MHRT?

A: Yes, sir.

QQ: You did hear that.

A: Yes, sir.

QQ: And, uhm, just to your recollection, what is the officer on the scene – what is his action according to the procedure once an MHRT is requested?

A: An MHRT is a mental health response trained officer to deal with subjects with possibly any mental illness. They are usually dispatched to every run that we have that has some type of subject, whether he is combative or not combative, uhm, that might have a mental or mental health issue. Uhm, I do recall that night also that a taser was requested on scene.

QQ: And, at that time, all tasers had been removed because those were the previous, uh, version of what you have been issued now. Is that correct?

A: Yes, sir. I've found out that subsequently after, uhm, the run that just supervisors at that time were equipped with tasers.

QQ: And, if an MHRT is requested, the officer who is on the scene there, it's my understanding he will do what he can to avoid physical contact with the person for whom the MHRT has been requested.

A: No, sir. No, sir. The first officer responds to a run, uhm, can request an MHRT officer, uhm, if needed. He is to handle the scene as best possible until the MHRT officer responds.

QQ: What about the reactionary gap? Are you familiar with that?

[p.10]

A: Uhm, if you could clarify that, a little bit sir.

QQ: The distance between a possible aggressive or violent person and the officer.

A: Yes, sir. I'm familiar with that.

QQ: You're familiar with your tactical control guide?

A: Yes, sir.

QQ: It mentions in there your reactionary gap?

A: Yes, sir.

QQ: If at all possible, to avoid injury to yourself or others in a situation that Pike encountered initially when he collided or came in contact with Mr. Jones?

A: Yes, sir.

QQ: Of course, you weren't there at the moment. It seems as though there could have been more evasive action taken on the part of the officers.

A: I, uh, can't comment on what Officer Pike saw. I wasn't there.

QQ: I understand that.

A: I do know that we're, uhm, trained, uhm, on the reactionary gap to keep as much distance as we can in a suspect or subject, or if he is combative, a lot of things factor in. If he closes the gap, then there's no way for us to keep that gap increased then we have to take whatever

measures necessary to maintain – to protect ourselves or any other citizens around.

QQ: Let me back up a little bit, when you were administering sternum rubs to Mr. Jones.

A: Yes, sir.

[p.11]

QQ: I, uh, would think you were doing that because he was not having any chest expansion or contraction. In other words, it didn't appear like he was breathing.

A: Yes, sir.

QQ: It did not appear to you that he was breathing?

A: He was breathing very, very faintly at that point where I started to administer chest compressions and try to see if I could unclutch his jaws to possibly apply CPR. His breathing became very, very faint, which – what you probably, if you do review the tape, what you probably will see is that we all stood back from Mr. Jones. At that time, Fire had responded on the scene. You knew they were the trained medical professionals, and we wanted them to, you know, do whatever they could to Mr. Jones.

QQ: Ken.

Q: I'd like to go back to the handcuffing process as he was being handcuffed. Did you – you said you were down there at the leg area, correct?

A: Yes, sir. His right leg.

Q: Okay. Were you able to see his face at that particular time?

A: No, sir.

Q: Did you hear any gasping or shallow breathing or anything coming from him?

A: He was still grunting sir; he was still struggling.

Q: Okay. But, he wasn't – he wasn't saying anything. Correct?

A: Not that I can recall. I just remember the grunting and the struggling.

QQ: At any time, did you hear him gasping?

A: No, sir.

[p.12]

QQ: You're familiar with the common term, the death rattle?

A: No, sir. I heard nothing like that.

QQ: You've – you've been present, uhm, when other people have expired on the scene?

A: No, sir. No, sir. This is the first time I've ever been involved in anything like this.

QQ: Have you been present at, uhm, for example, a heart attack victim on a normal run?

A: I've been on runs where the person has already been expired, maybe a gunshot, suicide or whatnot.

Q: Are you familiar with the fact that one of the – you said that Mr. Jones was still struggling as as the handcuffing process was going on. Are you familiar that one of the symptoms of positional asphyxia is for a person to struggle because they're struggling to try to get in a position to breathe?

A: Again, sir. I can't recollect verbatim; I don't have the paperwork in front of me, uhm, I do know that he was struggling. Whether he was struggling to get air or he was struggling to get free, I can't make that that recollection.

Q: Okay. Based upon what you observe and what you saw and what you did when you were on the scene, do you feel as though you have been adequately trained to handle a situation like that?

A: Yes, sir. The training that I had at that time at that night, I believe everything that I did once

I responded on scene was completely within the realm of what the Police Department would have me do from trying to restrain him so he

[p.13]

could be handcuffed to trying to administer some type of aid to a suspect or subject once he is handcuffed, uhm. We are – we were trained in the Academy on CPR, but we had no refresher courses since then. Uhm, I do know that I was not going to stand by and let Mr. Jones lay there and not try to do anything to help him.

Q: Have you had refresher courses since this incident?

A: No, sir.

Q: Is there anything other than possibly being recertified in CPR, any other recommendations that you would make to the training Academy based upon what happened out there that night?

A: The only thing that I would possibly think of to help us any more is if some of the officers were – had more medical training. If you have the MHRT officers, uhm, have some type of medical response, first aid officers, if Fire is tied up or whatnot. Uhm, that's the only thing I can think of.

Q: Okay. As far as self-defense tactics, do you think you have been adequately trained?

A: Yes, sir. Yes, sir.

Q: Dave?

QQ: No.

Q: Can you think of anything you'd like to add regarding that particular incident? Just regret that the Jones (inaudible).

Q: I've got – I've got one additional question about the MHRT officer. Did you, you said you heard the request for the MHRT officer? Correct?

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Exhibit 6

[p.46]

CPD Policies and Procedures 12.545 (Revised 02/03/04) Section E Page 18, subsection 6.

Use of Chemical Irritant states the following:

Officers may not keep a sprayed individual in a face-down position any longer than necessary to handcuff or end the threat of harm or escape.

CCA has concluded that Sergeant Waites, Officers Osterman, Pike, Abrams, Slade, Reese and Johnstone did not reflect the high standard of care and best practices embodied in the Cincinnati Police Department policy and training. Specifically, the involved officers appeared not to take into account the obvious sudden death syndrome risk factors when deciding how to restrain Mr. Jones and after the handcuffing was concluded.

CCA recommends that the allegation of *Improper Procedure* be **SUSTAINED** against Sergeant Waites, Officers Osterman, Pike, Abrams, Slade, Johnstone and Reese. These officers should be required to participate in a period of retraining specifically designed to enhance their awareness to the risk factors of positional asphyxia.

CPD Training Bulletin #2003/1:

Excerpt – *The Precipitating Event – A Violent Struggle*

Certain factors involved in the struggle are associated with positional asphyxia. They include:

***A Protracted Struggle**. Some experts cite the three-minute rule. If a struggle lasts longer than three minutes, the participants may experience high levels of lactic acid and low oxygen levels, increasing their risk for sudden death.*

***Suspect Position**. A suspect on his stomach, particularly on a hard surface, is at increased risk.*

***Pressure Applied on the Back**. In struggles where officers use body weight for control directly on the suspect's back, there will be increased risk of positional asphyxia.*

- *Head dropping – a person physically exhausted may allow their chin to drop to their chest, which further constricts airflow.*

Officers may not keep a sprayed individual in a face-down position any longer than necessary to handcuff or end the threat of harm or escape.

***Steps After the Struggle**:*

- *Once the individual is controlled, move him to a seated position. Do not leave the person prone on the ground.*

- *Look for signs of troubled breathing – Gasping, shallow breathing and inability to speak.*

Exhibit 7

City of Cincinnati

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Valerie A. Lemmie
City Manager

November 1, 2004

Mr. Wendell M. France
Executive Director
Citizen Complaint Authority
Suite 150
805 Central Avenue
Cincinnati, Ohio 45202

Dear Mr. France:

I am in receipt of the recommendations by the Citizen Complaint Authority and the accompanying report regarding the in-custody death of Nathaniel Jones. After careful and lengthy study and review of the report, the videotapes and other related documents, I conclude that I must disagree with the findings and recommendations of the Citizen Complaint Authority (CCA) Investigative Report.

On the issue of the officers' initial approach, I disagree with the conclusion of the CCA. The evidence available for review demonstrates that, in fact, Officers Pike and Osterman consistently attempted to keep an appropriate distance between themselves and Mr. Jones until the time that Mr. Jones assaulted Officer Pike. The reactionary gap, as referred to in your report, is a tactical concept, to which it appears the officers adhered. Moreover, the CCA report states that the officers failed to "disengage" as a reasonable option to allow Mr. Jones time to submit. However, my review of CPD's use of force policy indicates:

> Disengagement is a reasonable option in consideration of officer safety and the necessity to apprehend immediately. Disengagement, area containment, surveillance, waiting out subject, summoning reinforcements, or calling specialized units ***may*** be an appropriate response to a situation and ***should be considered.*** (emphasis added)

The use of the words "may" and "should be considered" cannot be interpreted as mandates, and therefore, this matter of discretion by the officer cannot rise to a violation of CPD policy.

With regard to the allegation of excessive use of force, I find that I must also disagree with the conclusion of the CCA. The CPD standard used for judging the appropriateness of an officer's actions states:

> When officers have a right to make an arrest, they may use whatever force is reasonably necessary to apprehend the offender or effect

> the arrest, and no more. Just as officers must be prepared to respond appropriately to rising levels of resistance, they must likewise be prepared to immediately de-escalate the use of force as the subject de-escalates or comes under police control. They must avoid using unnecessary violence. Their privilege to use force is not limited to that amount of force necessary to protect themselves or others, but extends to that amount reasonably necessary to enable them to effect the arrest of a resistant subject.

The CCA report states that the officers used excessive force because the use of the PR-24's was not "consistent with Mr. Jones' level of resistance." However, as noted above, police officers are permitted to use reasonable force that is not necessarily "consistent" with the degree of resistance, as long as such actions are in accordance with CPD policy.

Additionally, included in the report's conclusion regarding excessive use of force, is the deployment of chemical irritant by Officer Slade. Based upon the materials reviewed, and the standard as set forth above, it appears that Officer Slade's actions were consistent with Cincinnati Police Department (CPD) policies and procedures and, therefore, were reasonable and appropriate.

Lastly, there remains the CCA's finding of improper procedure regarding the handcuffing process. I agree that Mr. Jones should have been promptly moved from the face down position he was in when the officers were finally able to handcuff him. However, I believe

that what this illustrates is a need for additional training, rather than a need for discipline against individual officers. Such training as referenced by your report should include incorporation of CPD Training Bulletin 2003/1 into a policy, as well as training on the handling of similar circumstances.

In conclusion, upon review of your report as well as the videotapes and other related documents, this shall serve as notice of my disagreement with the CCA findings and recommendation as articulated in your August 2, 2004 final investigative report.

Sincerely,

/s/
Valerie A. Lemmie
City Manager

Exhibit 8

C C A COMPLAINT - #03513

Q = Ken Glenn
QQ = Dave Moonitz
A = Jay Johnstone
AA = Ed Schindler

[p.1]

This is June 25, 2004, approximately 8:30 a.m. I'm CCA investigator Ken Glenn here with CCA investigator Dave Moonitz. And, we're here with Police Officer Jay Johnstone and his FOP rep Mr. Ed Schindler. And, we're going to discuss CCA Case #03513. And that's a death in custody of Mr. Nathaniel Jones that occurred on November 30, 2003, approximately 6:00 a.m. at the White Castle parking lot located at 64 W. Mitchell Ave.

Q: Officer Johnstone, you read your rights and you signed your Advice of Rights.

Is that correct?

A: That's correct.

Q: I'd like to go back to the date of November 30, 2003, and can you tell me your assignment on that particular date, please?

A: I was Unit #5315, that's third shift, District 5.

Q: And, were you in uniform?

A: Yes.

Q: Okay. And, can you tell me on that particular evening at approximately 6:00 a.m., uhm, how you happened to arrive at the location of 64 W. Mitchell and what happened when you got there and what you observed?

A: Okay. I was originally dispatched to the radio run along with Officer Pike. Shortly after being dispatched, I was disregarded by Officer Osterman. So, I acknowledged my disregard over the air. Uhm, I'm not sure what the time frame is, but I eventually was dispatched to another radio run up on Beat 1 for a residential burglar alarm along with Officer Schulte. Uhm, at some point, I

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[p.3]

Q: Once the – once you completed the handcuffing process, you said you assisted with the left arm, correct?

A: Yes.

Q: And, once that handcuffing process was completed, what was your next step? What did you do?

A: At that point, I just stood up. We, uh, all checked on each other to make sure everybody was okay.

Q: What position was Mr. Jones in once you stood up?

A: On his stomach.

Q: Did you ever hear him gasping for air or was there any signs of trouble breathing coming from him?

A: No, not that I noticed.

Q: Did you – were you able to see his face once you stood up?

A: I don't recall looking at his face.

Q: Dave?

QQ: Upon your arrival, did you observe anybody striking Mr. Jones at that time?

A: No.

QQ: After cuffing that – you guys rose to your feet, at what point was Mr. Jones rolled on to his side or back, do you recall?

A: I don't recall the exact timeframe. It wasn't long after we placed him in custody.

QQ: Do you remember who did that?

A: No, I do not.

[p.4]

QQ: Were you there when the Fire Department arrived back on the scene?

A: Yes.

QQ: Did you – were you close proximity still when the Fire Department approached Mr. Jones?

A: No.

QQ: What did you do – what were you doing at that time, if you recall, when the Fire Department arrived back?

A: Uhm, I know I was behind Officer Pike's car talking with at least one or two of the other officers involved.

QQ: So, you didn't hear any conversation with any of the officers or firefighters as they went to tend Mr. Jones?

A: No.

QQ: Are you familiar with positional asphyxia?

A: Yes.

QQ: Basically, what is the main cause of positional asphyxia, if you recall then?

A: What is the main cause?

QQ: Yes.

A: Body weight pressing lung capacity.

QQ: Are you aware of any symptoms of the person experiencing that?

A: No, I'm not.

Q: At any time, did you hear any mention – anyone mention anything about Mr. Jones having difficulty breathing or not being able to breathe?

[p.5]

A: I heard one of the officers state, "Check his pulse." An officer then checked his pulse.

QQ: Do you remember which officer?

A: No, I don't.

QQ: Do you recall what the response was from the officer when he checked the pulse?

A: That he, uhm, felt a weak pulse, but he wasn't sure he was breathing.

QQ: Was that, if you recall again, before or after Mr. Jones was rolled over?

A: I don't recall.

QQ: Ken.

A: I'd like to go back to the handcuffing process as he was being handcuffed. What was your position during that handcuffing process?

Q: I was kneeling to his left side.

Q: When you say kneeling, were you down on the ground? Was your knees on the ground?

A: I don't remember specifically.

Q: Did you ever observe any officers with their body weight on Mr. Jones' back?

A: No.

Q: Regarding positional asphyxia, are you – do you recall ever being trained on Training Bulletin 2003/1 ?

A: No, I do not.

Q: Did you ever receive a copy of that Training Bulletin?

A: I don't remember if I did or did not.

[p.6]

Q: What is the Police Department's process in terms of when a Training Bulletin has been issued by the Academy? What's the normal process that occurs with those Training Bulletins?

A: I knew they're included in the staff notes, which are then handed out at roll call. And, you have to sign a sheet stating that you read the staff notes.

Q: So, the actual Training Bulletin becomes part of the staff notes?

A: Correct.

Q: Do you recall ever signing that you received a copy of the Training Bulletin?

A: I know that it's required that I sign each week. And, they don't turn in the sheet until they're signed off by the officers.

Q: Are those Training Bulletins normally something that's part of roll call training, that's discussed by a supervisor at roll call?

A: I'm not really sure if it's done consistently or not.

Q: Okay, so as you receive those Training Bulletins, you don't recall what your supervisors discuss each time you receive a particular – not this particular Training Bulletin, but any Training Bulletin. You don't recall whether they actually discuss; I mean, you've signed for it, that you've received it, and you don't recall whether a supervisor always discuss those Training Bulletins?

A: Well, I don't sign that I receive it, I sign that – there's one copy that goes around with a sign-on sheet on the front of it. And, you're handed it at roll call to look over it. And, then you sign it.

Q: Okay. So, you don't receive your own individual copy of the Training Bulletin?

A: Correct.

* * *

Exhibit 9

C C A COMPLAINT #03513

Q = Ken Glenn
QQ = Dave Moonitz
A = Sgt. James Waites

[p.1]

Today's date is June 18, 2004, the time is at approximately 9: 10 a.m. I'm CCA investigator Ken Glenn here with CCA investigator Dave Moonitz. And, we're here with Sgt. James Waites. And were going to dicuss citizen, CCA case #03513. This is death in policy custody of Nathaniel Jones that occurred on November 3, 2003.

Q: Sgt. Waites, you read your Advice to Rights. You understand you have the right to have a FOP rep and an attorney present. Is that correct?

A: Yes, I have.

Q: You have read your Advice to Rights and you've signed them. Is that correct?

A: That's correct.

Q: Okay. I'd like to start off with – can you give me your name – the spelling of your name, please.

A: First name is James, common spelling. Last name is Waites – W - A - I - T - E - S.

Q. And, Sgt. Waites, how long have you been with the Cincinnati Police Department?

A: Twelve years.

Q: And, how long have you been a supervisor?

A: Six years.

Q: And, what is your current assignment?

A: Currently assigned to patrol, District 5.

Q: And, what were you – was that your assignment on November 30?

A: Correct. As a patrol supervisor working in District 5.

* * *

[p.7]

A: Yes sir. When I got there, like I said, uhm, Sgt. Battison responded. I guess he got there a couple of seconds after I did and basically rolled him over. Once they rolled him over –

QQ: They did roll him over as soon as Sgt. Battison said to do that?

A: I believe it was two people I think. Another officer also said to roll him over. That's when I made my observation and looked at him, I didn't – the situation (inaudible).

Q: Okay. You said that Sgt. Battison and another officer said, "Roll him over."

A: As far as I can recall, yes.

Q: Okay. And, when you first observed him as he was lying on his – lying face down. Are you familiar with positional asphyxia?

A: Yes, sir.

Q: And, can you tell me, uhm, are you familiar with training bulletin 2003/1?

A: I may have seen it, but I don't have a copy of it.

Q: Have – prior to that particular evening, have you or any other supervisors given roll call training relative to this particular training bulletin?

A: In February 2003 – is that when that came out? I don't recall.

Q: You don't recall. Is it normal policy – what is the policy of CPD when Training Section issues a training bulletin?

A: We have a training calendar, a training sergeant, and basically on each relief, we have a training calendar where there's just 30 days in a calendar year/month, each day there's some type of training for that particular of day already issued by the Police Academy basically.

So, everyone in the city is covering the same topics on

[p.8]

that particular day. And, then there's day, of course, during the week that, I guess, you know, administrative training basically anything you feel like you need to cover for that particular relief, you can cover.

Q: Okay. So you don't specifically recall – are you the training supervisor for your shift?

A: No, sir. No. At the time that this – Nathaniel Jones – incident occurred, I was on night shift, of course. I believe when this training bulletin came out, I was on day shift, so I was on a totally different shift, as I can recall.

Q: Okay. So, but do you individually have – had you read this training bulletin prior to that particular incident?

A: I, uh, don't specifically recall reading this bulletin, but I'm sure if it came through in the packet as far as on the staff notes, or something like that I probably did see it.

Q: Are you aware of the symptoms of positional asphyxia?

A: I'm sure somewhere in there, but, uhm, yes, I'm aware of positional asphyxia.

Q: And, as Mr. Jones lie on the ground –

A: You say as Mr. Jones lie on the ground, like I said, when I got there, I had no indication how long he had lied there on the ground, or how he had got to that position.

Q: Did you – when you saw him there, for whatever period of time, did you inform anyone, well, this man needs to be turned over, or did you, yourself, think that he's laying on the ground, he looks obese, maybe he needs to be turned over, did you instruct the officers to get him over?

[p.9]

A: I uh – I never gave that specific directive. Like I said, at the time, when I got there, the officers that were standing around were, more or less, breathing heavy. They had been in some type of struggle. I knew they had been in some type of struggle. I figured, I mean, I guess, it never dawned on me that he had been placed in that position or I thought maybe he may have rolled over, you know, after the struggle itself. It never dawned on me.

Q: Did you make a medical observation of your officers?

A: Uh, the officers that seemed to be directly involved, because I never found out exactly who was involved. One officer complained of a scratch, I believe it was behind his ear. I think

another officer – he had just some kind of minor scrape or something. No one ever said anything about it.

Q: Are you aware in that training bulletin there was also a section that – that's directed toward watch the officers? Are you familiar with that portion of the bulletin?

A: You have it in front of you. I don't have it in front of me, but I'm sure, like I said, I went over it. I don't remember it word for word, but I did go over it.

Q: I'd like to go back to the incident itself. Did you observe when the firefighters started administering CPR?

A: I was in the vicinity; I don't really recall that so much. At that point, I was basically trying to set up a perimeter for a crime scene.

Q: What are the steps for the supervisor once they arrive on a scene like that?

A: What are the steps?

Q: Right.

[p.10]

A: As far as the seven critical tasks?

Q: Right.

A: Seven critical tasks – I have them written down. Right off the top of my head, uhm, uhm, I guess secure the communications, uhm, let me see, communications, identify kill zone, uhm, outer perimeter, inner perimeter, four, staging area, the command post, and I guess I missed something, one or two.

Q: That's okay. I didn't want to –

A: Like I say when I first got there, I was trying to establish some kind of communication because there was a whole lot of radio traffic and whole lot of people still responding to the scene and things of that nature.

Q: Did you observe any officers administering any sort of first aid or some type of CPR with Mr. Jones?

A: I did, uh, observe Officer Reese attempt to start CPR.

Q: And, what – what exactly did he do?

A: Uhm, I'm just referring basically to what I saw in the tape also. I guess he straddled Mr. Jones and attempted to give chest compression.

Q: And, was there a point – was Mr. Jones still handcuffed when the Fire Department arrived?

A: I don't think – I don't recall him ever being unhandcuffed. I don't recall that.

Q: Do you recall –

A: My responsibilities – at that point, like I said, when I looked down and didn't think Mr. Jones had any life left, basically considered this a crime scene. I was just securing the crime scene.

* * *

Exhibit 10

Cincinnati Police Academy
Training Bulletin
Sudden Custody Deaths and Positional Asphyxia

 # 2003-1 **February, 2003**

Introduction

An in-custody death, tragic in and of itself, is an event with serious consequences for both the Department and the officers involved. Beyond the multitude of investigations and lawsuits, involved officers are at high risk for a variety of social and psychological problems including Post -Traumatic Stress Disorder.

There is a growing body of knowledge about positional asphyxia and an increasing recognition of its role in in-custody deaths. More importantly, a number of risk factors have been identified that can assist officers in reducing the chances of a sudden in-custody death.

References:

P.M. 12.600 PRISONERS: SECURING, HANDLING, AND TRANSPORTING

Chicago Police Training Bulletin on Positional Asphyxia

"Positional Asphyxia and Sudden Death" National Law Enforcement Technology Center

"Police Custody Death Syndrome" Wayne County Sheriff's Department

"Legal Lights," The Trainer, December, 2002.

Fernandez v. City of Cooper City, 11th Circuit, May, 2002.

Information

Consider this scenario. A number of officers arrive on the scene of a disorderly person threatening passers-by. They observe a somewhat overweight and intoxicated individual, extremely agitated, sweating profusely, and yelling. As the officers attempt to control the individual, a violent struggle ensues. The individual ends up face down on the ground and is handcuffed. A few minutes later, the individual stops breathing.

Put simply, positional asphyxia can occur when a person's breathing is restricted from pressure exerted against the chest or the position of a person's head causes obstruction of their airway. Either of these conditions can result from a body position that interferes with breathing. Some restraint and transport positions increase the risk of positional asphyxia.

Factors Related to Positional Asphyxia

There is general agreement that certain factors increase the risk of positional asphyxia. These factors include –

Cocaine Induced Delirium - This is a side effect suffered by some cocaine users. It is characterized by disorientation, hallucinations, and an increase in heart rate.

Other drug/alcohol use - Intoxication may reduce respiratory function.

Physical Build - Obesity has been identified as a factor increasing risk for positional asphyxia.

Environment - Extreme temperatures increase risk.

Underlying Health Problems - Asthma, emphysema, and heart disease have all been implicated as factors.

The Precipitating Event - A Violent Struggle

Apprehension and control of violent individuals is one of the core functions of police. The use of reasonable physical force to control people is an all too common necessity for officers. Yet the death of an individual following such a struggle is extremely rare. Certain factors involved in the struggle are associated with positional asphyxia. They include:

A protracted struggle - Some experts cite the three-minute rule. If a struggle lasts longer than three minutes, the participants may experience high levels of lactic acid and low oxygen levels, increasing their risk for sudden death.

Suspect Position - A suspect on his stomach, particularly on a hard surface, is at increased risk.

Pressure Applied on the back - In struggles where officers use body weight for control directly on the suspect's back, there will be increased risk of positional asphyxia.

Steps After the Struggle

1) Once the individual is controlled, move him to a seated position. Do not leave the person prone on the ground.

2) Look for signs of troubled breathing – Gasping, shallow breathing, inability to speak.

3) Head dropping – A person physically exhausted may allow their chin to drop to their chest, which further constricts airflow.

Individuals who speak clearly or remain verbally combative are not at risk. If there are any concerns, get immediate medical assistance.

Watch Other Officers

Officers involved in intense physical struggles may also experience medical problems., Any officer whose breathing is labored, has trouble speaking, and/or experiences chest pain should immediately request medical help. In the sometimes chaotic situations in which officers work, it is crucial that everyone on the scene be alert to these problems.

One Court Case*

In circumstances similar to the scenario described above, Fidel Fernandez died after a struggle with officers in Cooper City, Florida. The plaintiffs argued that the death of Fernandez from positional asphyxiation stemming from prone restraint, pressure on the upper torso, and a struggle in handcuffing Fernandez was evidence of unconstitutionally excessive force. The court ruled for the officers, stating "..it is unclear as to what reasonable alternatives the officers had in dealing with Fidel. The prone restraint pressure on the upper torso, ... and struggle were all the result of Fidel's illegal, physical, and prolonged resistance. ... Sympathy for a plaintiff does not transform law enforcement officials' objectively reasonable responses to a volatile situation into a constitutional violation."

**Be aware this is a Florida case and Ohio courts may view the case differently.*

QUICK CHECK REVIEW

1. Positional asphyxiation can occur from:

   a. pressure exerted against the chest or back
   b. the position of a person's head
   c. any body position interfering with breathing
   d. all of the above

2. Factors that increase the risk of positional asphyxiation include:

a. disorientation, hallucinations, and an increase in heart rate.
b. being intoxicated
c. being overweight.
d. very hot or very cold days.
e. chronic illness/disease.
f. All of the above.

3. True or False: A struggle lasting longer than three minutes increases the participants' risk of sudden death.

4. True or False: Following a struggle, the individual being controlled should be moved to a seated position and checked for signs of breathing difficulties.

5. It is crucial that <u>all participants</u> in intense struggles be watched for:

a. labored breathing
b. trouble speaking
c. complaints of chest pain.
d. All of the above.

Answers: 1-d; 2-f; 3-True; 4-True; 5-d

* * *

[p.2]

Colonel Thomas H. Streicher, Jr., Police Chief

February 25, 2003

1. LEGAL SUPPORT

   Ernest McAdams, Jr., City Prosecutor, will be out of the office from February 22 to March 10, 2003. All questions may be directed to Charlie Rubenstein, Chief Assistant City Prosecutor.

2. TRAINING BULLETIN #2003-1 - SUDDEN CUSTODY DEATHS AND POSITIONAL ASPHYXIA

   Attached to these Staff Notes is the latest training bulletin published by the Police Academy. This bulletin discusses the issues surrounding sudden custody deaths and positional asphyxia, including:

   - Factors related to positional asphyxia;
   - What to be alert for during a violent struggle;
   - Steps to take after a struggle;
   - Some symptoms to be alert to in both the person in custody and the officers involved in the struggle, and
   - A court case judgement in a positional asphyxiation death in Florida.

Questions may be directed to the Police Academy staff at line 352-3562.

3. SPAM EMAIL

SPAM email is generally unwanted, unsolicited email, which is forwarded through various electronic mailing lists. SPAM email can be dangerous because it can transport viruses and bog down the email system. Users are reminded not to forward SPAM email through the Department's mailing list. The "Police All" list, as all Department email, should be used only for business purposes. Examples of these are press releases, crime information, or information that effects Department employees with their duties.

Exhibit 11

C C A COMPLAINT #03153

Q = Ken Glenn
QQ = David Moonitz
A = Sgt. Jeffrey Battison

[p.1]

It's July 1, 2004; time is approximately 7:15 a.m. I'm CCA investigator Ken Glenn here with CCA investigator Dave Moonitz. We're here with Sgt. Jeffrey Battison, and we're going to discuss citizen complaint #03153. It's a death in custody of Mr. Nathaniel Jones, that occurred on November 3, 2003 approximately 6:00 a.m. at the White Castle Restaurant located at 64 W. Mitchell.

Q: Sgt. Battison, you read your Advice of Rights. And, you understand you have the right to have an FOP rep and attorney present. You signed your Advice of Rights, is that correct?

A: Yes, sir.

Q: I'd like to start off. Can you tell me how long you've been with the Cincinnati Police Department, and how long you have been a supervisor?

A: I've been a Cincinnati Police Officer since January 15 of 1996. Uhm, I've been a sergeant for almost a year, now.

Q: OK, and, uhm, on the date of November 30, what was your assignment?

A: District 5, supervisor for third shift.

Q: OK. And, that's patrol.

A: Yes, sir.

Q: Was that in uniform?

A: Yes, sir.

Q: OK. Let's go back to that particular day. I'd like to start off with when you first were notified by Communications, from that point on, what – what did you

[p.2]

QQ: Let me interrupt you regarding that. Jones was in what position when you first arrived?

A: He was handcuffed.

QQ: But, in what position? He was on the ground, prone, supine?

A: He was laying on the ground. I don't know if he was on his back or his side. In fact, I don't recall exactly how he was laying.

QQ: OK.

A: But, I do remember one of the officers to roll him on his side, so he was either face down or face up.

* * *

[p.5]

Q: OK.

QQ: Is that in all districts, or just (inaudible) district?

A: Only the channel that you're on. If, for instance, my radio is on Channel 5 right now – if I turn the radio on, I'll hear the dispatcher and I'll also hear the officer, but there is a way from Communications that they can turn, I guess, it's the repeater or whatever, off where you're only hearing the dispatcher, like you're hearing the officer and the dispatcher.

Q: Go ahead.

QQ: Do you recall who the officers were that were present when you arrived?

A: Officer Pike, uhm, Osterman, uhm, Tom Slade, and Guy Abrams, uhm, Sgt. Waites was there. I believe Sgt. Brazile showed up about the same time I did.

Q: And, what were they doing when you did arrive?

A: Uhm, when I got there, Sgt. Waites, I noticed that he was in the parking lot, uhm, I don't know exactly what he was doing. Uhm, I honestly don't know what everybody was doing. When I got there, my first, uhm, indication was I asked if the fireman, because I had seen them driving down Mitchell, if they had helped out or not. And, like I said, I saw Mr. Jones and one of the officers who said that they didn't think that he was breathing. I requested that the fire respond back. What – what everybody was doing, I honestly don't know.

QQ: How close did you get to Mr. Jones?

A: I don't recall an exact distance. I would say between five and ten feet.

QQ: Did you see when they rolled him onto his side?

A: Yes.

[p.6]

QQ: Were you able to observe his face at all?

A: Uh, no.

Q: Once the firefighters arrived back on scene, were you – were you still standing close to Mr. Jones?

A: I was in the area, yes.

Q: Did you hear the firefighters request that the handcuffs be removed?

A: I don't recall if that was ever done.

Q: Were the handcuffs removed?

A: I don't know that either.

Q: Are you familiar with Training Bulletin 2003/1 on positional asphyxia?

A: I know there was one put out.

Q: Have you reviewed that training bulletin?

A: I've read all the training bulletins at one time or another, yes.

Q: Were you ever part of roll call training when the officers on your shift were trained? Or, were you – were you the training officer that would have trained these officers on this Training Bulletin?

A: I do roll call training since I became a sergeant, but I've never had this come across as – a focus for that day to be done. Not to say that it hasn't been done, because when I'm not working, other officers or other supervisors do that job.

Q: What's the normal policy when a Training Bulletin comes up? How's that disseminated to the officers?

A: Normally, it comes in staff notes and uhm, each, each Tuesday, we get new staff notes. They're weekly done. And, if there's information that's in there, it's in a

[p.7]

staff notes. And it's, uhm, each week, staff notes are gone over during the roll call training every Tuesday and Wednesday. And, then if there's information in there such as updates for the procedure, (inaudible), they're all in there. It's up to the officers to make a copy for himself. They're all gone over.

Q: So, you said it's up to the officers to make a copy for themselves.

A: In the district that I'm in, that's it. I've been in other districts where they actually have, every time there's an update made, it's given to the officer. At District 5, for whatever reason, that's the way it is.

QQ: There's no requirement for uh, officers to keep a book of Training Bulletins that they've been ?

A: Uh, I don't know if there's a requirement to keep the Training Bulletin, but it's a requirement to keep the procedures updated and know all the procedures that whenever there's a change to be aware of it and to be updated on it.

QQ: Are those ever checked by supervisors for current status?

A: I'm not aware of that. No.

Q: You said that when you arrived on the scene, that Mr. Jones was, uhm, on the ground handcuffed. Were there any officers assisting him at that particular time?

A: Uhm, I believe while I was there, uhm, there was an officer that had checked – either his breathing or his pulse. Uhm, another officer, I believe, did like a chest rub, to try to get a response out of him.

Q: Who were those officers?

* * *

Exhibit 12

C C A COMPLAINT #03513

Q = Ken Glenn
QQ = Dave Moonitz
A = Sgt. LeRoy Brazile

[p.1]

This is June 18 at the office of the Citizen Complaint Authority. The time is approximately 7:40 a.m. I'm CCA investigator Ken Glenn, here with CCA investigator Dave Moonitz. And, we're here with Sgt. LeRoy Brazile. We're going to discuss citizen case #03513. This is the death in custody of Mr. Nathaniel Jones that occurred on November 30, 2003.

Q: Sgt. Brazile, you have read your Advice to Rights. You understand you have the right to have a FOP rep or attorney present. Is that correct?

A: Yes.

Q: And, you've read your Advice to Rights and you've signed them, is that correct?

A: Yes.

Q: I'd like to start off – can you give me your full name and spell your last name for me?

A: Yes. My name is LeRoy Darwin Brazile. The spelling of my name L-E-R-O-Y. D-A-R-W-I-N. Last name is B-R-A-Z-I-L-E.

Q: And, can you give me your assignment, please?

A: District 5, third shift.

Q: And, that's patrol. Yes, it's patrol.

Q: Okay. And, how long have you been with the Cincinnati Police Department?

A: Seventeen years.

Q: And, how long have you been a supervisor?

A: Since '97. That would make it almost seven years.

* * *

[p.7]

QQ: When you observed Mr. Jones initially, he was– if, do you recall, was he handcuffed behind his back or ?

A: Yeah, he had several, I believe, he had several cuffs, handcuffs chained together.

QQ: Right. Did at any time did you see them remove the handcuffs?

A: No. They were – I didn't see them remove, but I mentioned that they should be.

QQ: Who did you mention that to?

A: Just in general conversation, I said, you know, they needed to be taken off before they work on him.

QQ: Did you have any conversation with any Fire Department personnel while you were there?

A: No, what we did, Sgt. Battison was handling that, so we split up our tasks so that things don't get confused. I let him deal with that – that end of it.

QQ: Did you have a conversation with any of the officers who were present, other than the other supervisors?

A: Just the initial what happened. At that point, (inaudible), then we started – started posting people and started calling people. And, calling stand-by cars and people because we had a crime scene.

QQ: Do you recall which officer you talked to regarding that conversation?

A: No, because there was a lot of confusion out there.

QQ: I understand.

Q: **What is the – you're familiar with the 12.110 section of your policy, Handling Suspected Mentally Ill People, in relation to the MHRT officer?**

A: **Yes.**

* * *

Exhibit 13

City of Cincinnati

Interdepartmental
Correspondence Sheet

Date 11/3/04

To	Mayor and Members of Council
From	Valerie A. Lemmie, City Manage
Copies to	Young, Holston, Stiles, Streicher
Subject	Response to CCA recommendations on the Nathaniel Jones Case

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I have completed my review of the aforementioned case and yesterday advised the CCA Executive Director by written correspondence of my disagreement with their findings and recommendations. This correspondence is attached for your information and review.

This case received national attention and there is also litigation pending against the City by the Jones family, so I recognize that this continues to be a case of concern to many. This is why I believe it important to inform you directly of my decision.

Additionally, in response to the in-custody death of Mr. Nathaniel Jones on November 30, 2003, the Cincinnati Police Department (CPD) made immediate procedural modification in three areas that have proven to be extremely effective in reducing injuries to suspects and

officers. While the death of Mr. Jones is tragic, I do not believe our officers violated CPD policy. I summarize the procedural changes below for your information.

TASER Deployment

The Cincinnati Police Department began full implementation of the X26 TASER on January 26, 2004. All officers have been trained and equipped with the X26 TASER. TASERs are now available anytime a CPD officer is on the scene of an incident.

In an eight month period in 2004, beginning with February, when full deployment of the TASER began, through September 30, 2004, injuries to officers associated with the use of force have declined more than 80% compared to the same period last year. Injuries to subjects in use of force incidents declined more than 30% compared to the same period last year.

Cardiopulmonary Resuscitation (CPR) Training

At the time of the incident involving Mr. Jones, Cincinnati police officers received CPR training during recruit training in the Police Academy. Officers received no additional CPR training after graduation from the Police Academy and were not re- certified in CPR during in-service training.

In April 2004, the Police Department certified a group of CPR trainers who then served as trainers for Department personnel. As of October 31, 2004, all field personnel (the Department's first responders) have been trained and certified in CPR. The Department

will continue to re-certify officers in CPR through annual in-service training.

Valve bag masks for adults and children have been placed in all patrol vehicles.

On June 20, 2004, Cincinnati Police Sergeant Diane Reed and Officer Donald Brown provided CPR to an 8 year old child who had been assaulted and had stopped breathing. They are credited with saving his life. Sergeant Reed is one of the Department's CPR certified instructors.

Fire Response Policy

Since the time of the incident involving Mr. Jones, the protocol for the Police and Fire Department roles at the scene of an "Officer Needs Assistance" incident have been further clarified. Previously, the ranking Fire Department officer on the scene had the authority to determine whether to remain on the scene after the police responded to a request for police assistance from the Fire Department. "Officer Needs Assistance" calls did not automatically cause notification of the Fire Department. The incident involving Mr. Jones began with a request by the Fire Department for police to respond. Subsequently, an "Officer Needs Assistance" call was broadcast as officers attempted to arrest Mr. Jones. The Fire Department left the scene prior to resolution of the "Officer Needs Assistance" incident and without consulting with the police officer-in-charge at the scene.

The Police and Fire Communications Section has implemented a new procedure for dispatch of police

and fire resources to "Officer Needs Assistance" incidents, These incidents are now classified as a "Combined Incident"[1] in the computer aided dispatch (CAD) system and both police and fire units are dispatched to respond. Once on-scene, Fire Department personnel are required to contact the police officer-in-charge of the scene, before leaving the scene, to insure Fire Department assistance is not needed.

Additionally, if the on-scene police supervisor disregards additional police units at the scene of an "officer needs assistance" incident, it is the responsibility of the police dispatcher to determine if medical assistance may still be needed. Unless specifically disregarded, the Fire Department will continue to respond to the scene. In cases where the scene is still volatile, a safe staging area close to the incident will be established and Fire Department resources will stage there until the police officer-in-charge at the scene advises the location is secure and it is safe for the Fire Department to respond to the scene.

Attachment: Letter to Wendell France, CCA Executive Director

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[1] The "Combined Incident" classification means both police and fire resources are needed. Examples of other "Combined Incidents" include auto accidents with injuries, assault (or other crime against a person) with injury, report of a house fire (police needed for traffic control), etc.

Exhibit 14

C C A COMPLAINT #03513

Q = Ken Glenn
QQ = David Moonitz
A = Police Officer Michael Schulte
AA = FOP Rep Ed Schindler

[p.1]

The day is May 5, 2004. The time is approximately 7:30 a.m. at the office of the Citizen Complaint Authority. I'm CCA investigator Ken Glenn, here with CCA investigator Dave Moonitz. And We're here with Police Officer Michael Schulte and his FOP rep Ed Schindler. That's S-C-H-I-N-D-L-E-R.

Q: Officer Schulte, you rad your Advice to Rights, you understand your rights and you understand them. Is that correct?

A: That's correct.

A: This is an incident that occurred on November 30,2003 at approximately 6:00 a.m. at the -- in the White Castle parking lot located at 64 W. Mitchell Ave. I'd like to start off, Officer Schulte, can you give me your assignment on that particular day? I want to back up, how long have you been with the Police Department?

A: A little under six years.

Q: What was your assignment on that particular day?

A: Routine patrol in uniform.

Q: I'd like to go back to that date of November 30. Can you tell what happened and how you arrived at that particular location?

A: Yeah, I, uh, was, I believe I was on, a MHRT run, which was in Clifton, which was off of my beat. The run came out, the Fire run, I believe, I believe it was a Fire engine requesting assistance. They sent some units to it and I believe it turned into an "officer needs assistance" run. Like I said. I was all up in Clifton

[p.2]

so I had quite a long ways to get there. When – by the time I got there, the incident – the struggle was over, when I got there, I saw Mr. Jones lie on the ground; he was already handcuffed; one of the officers was doing some chest compressions, I believe. Uh, the Fire Department was gone. They recalled the Fire Department back, and then the Fire Department got there. I grabbed some crime scene tape, began to tape off the scene, uh, separated Officers Pike and Osterman; see to it – saw to it that Baron got put into one car. I put Pike, Officer Pike in my car, continued to tape off the scene and basically just sat with Officer Pike until we all went to CIS.

Q: Okay. I'd like to back up to when this call first came up. You said that you came out as a "officer needs assistance." Did that run also come up – did you ever hear Officer Pike requesting an MHRT officer?

A: Uhm, the run actually came out I think as as the Fire Department was requesting assistance. That's what the original run came out as.

Q: Okay, but after that particular part of it, did – was there a point when you responded as the MHRT officer?

A: Well, I was responding any ways, but I don't remember if Officer Pike specifically asked for an MHRT car to respond there.

Q: Okay. You are MHRT-certified. Correct?

A: That's correct.

Q: Are you the only officer on that particular shift that's MHRT-certified?

A: Uh, no. There are some other officers.

Q: Were you the only officer on that particular night that was MHRT-certified?

* * *

[p.9]

Q: Do you think that your training adequately prepared you to be a MHRT officer? Is there something that you think that maybe – the department, the city administration should add to the training program?

A: No, I think a week was sufficient, you know. And like I said, it wasn't, plus most of the officers already have on-the-job experience also, you know what I mean. They've been doing these type of runs before the MHRT program was established, you know. It wasn't like they had green recruits right out of the Police Academy who just cut loose who had no time on the streets. At least from what I can remember, most of the people that were in there at least had some time on, so they would have had some experience dealing with people with mental health issues.

QQ: One of the things we do, Officer Schulte, is do make recommendations to the city and that's where I think this thing is leading to about – the MHRT. Do you think there are enough MHRT officers on the street at one time?

A: I don't know how the – how many are on the other districts – or on every shift, but I know, like on our relief, there's enough. There's maybe four.

QQ: On your shift.

A: Just on our shift.

QQ: With your off days and so forth, what is the maximum you would have in the field at the time?

A: I would imagine there's – there would be some times where I would think all four would be on the street.

QQ: But, then there would be other times when there's only one. Is that correct?

[p.10]

A: Yeah. But, like I said before, that would be the reason, you know, if there was a shortage, that they would dispatch one from another district.

QQ: What about updated training? Do you think that should be part of the program?

A: I think – uh, I think it actually is. I think maybe they were in the process of doing a refresher. I mean, don't quote me on that, because I'm not positive, but I mean, if they're going to keep a program like that, I would imagine that they would have something like that.

QQ: But, it's been two years since you went through?

A: Maybe, or a little under two years. A year, a year and a half. Something like that.

Q: Is there anything that you would suggest, and we're – we're sticking right with MHRT training program, is there anything that as an officer that you would say, "Hey, let's add this to it. We need more training in this particular area, or that area." Is there anything that you would say to the administration, "Let's get more training in this particular area?"

A: Uhm, no. I think the training we went to was pretty good. They had all – they were all mental health professionals. People who had a lot of knowledge in the field they had been in. They had been doing it for a long time, so I think it was sufficient, and you can only do some much and give so much training in one week. They tried to put as much in it as they could, you know, give you as any different aspects, you know, so, you know, like I said, a lot of it is just experience you gain on the job. You, uhm, just, you know, you just can go over and over it again.

* * *

Exhibit 15

CCA COMPLAINT #03513

Q = Ken Glenn
QQ = David Moonitz
A = Greg Adams

[p.1]

The date is June 2, 2004. I'm CCA investigator Ken Glenn, here with my partner Dave Moonitz and we're here with firefighter Gregory Adam and the firefighter's union president Joe Arnold. Time is approximately 7:30 a.m. and we're going to discuss the incident that occurred on November 30, 2003 regarding Mr. Nathaniel Jones.

Q: Uh, Greg, I'd like to just start off with – can you tell me how long you've been with the Fire Department?

A: Ten years.

Q: And, on the day of November 30, what was your assignment?

A: I was the acting officer on Engine Company 38.

Q: Uhm, are you – can you describe your training regarding? You're an EMT, correct?

A: That's correct.

Q: Can you tell me what the training process is regarding being an EMT?

A: Well, I went through sixteen weeks of school at Cincinnati Fire College down at Longworth Hall. During that process of sixteen weeks, you know, you go through different things concerning EMS and becoming an EMT, so you can become nationally registered.

Q: OK, and do you have – is there an annual training that you go through, or monthly training? What's your yearly training that you go through?

A: Well, we go through continuing education. You get like forty hours of continuing education in EMS annually, so you can be certified through the state.

Q: OK. And, you said on November 30, you were the acting supervisor.

A: That's correct.

* * *

[p.5]

here. He started shouting obscenities to some people who had pulled in right here at the Marathon station. They were trying to make a phone call because I was watching out the door. He was cussing those individuals out. Uhm, at that point in time, I just watched him, and then

he started shouting you know, to the top of his lungs about Gerald Levert. "We're going to tear this M. F. down," so I went back inside to, and I watched him from the window.

Now, that's when I called the police because I'm thinking about the women in here are upset; he's cussing at the people across the street; we still have people in the drive-through. To me, it was a matter of public safety, you know. He may be a danger to himself, you know. He's got the people inside afraid, so I'm calling for the police so I can talk to the person.

So, at that point, well, I called for the police. The first cruiser came down. I don't know what happened to Mr. Jones because I went back inside. The cruiser came down this way. But, I did go back out, and the people who were at the drive – through, there was another group of folks at the drive-through they said, "Don't go over there." By this time he had went over there, I didn't see him though. And they said, "Don't go over over there." And I said, "Why not?" They started laughing. He's acting up. He is going to want you to dance with him, because he was dancing, he was dancing and singing some stuff. I said, "That's OK. I have police responding."

By the time that I say that, I see a cruiser come down the street, come around this way where our apparatus was parked, and I started talking to him right there. At that point, I told

him, you know, what the situation was. As I was telling this

* * *

[p.16]

QQ: And, the third officer, you didn't observe him pull his baton or –

A: Uh, I didn't observe that. No. I just saw him. I saw him pull up, get out. I continued to watch them and he came over to assist.

QQ: Ken.

Q: The third officer, when he arrived. Let me rephrase that, other than you saying, the shorter of the two officers used chemical irritant when he first, when Mr. Jones approached him, and they were approaching one another, correct?

A: Yeah.

Q: Did you observe another officer using chemical irritant?

A: No, I just remember the first gentleman – the first officer. I don't recall anybody else using, it.

Q: OK. During the struggle itself –

A: Yes.

Q: You did not observe the officer use chemical irritant.

A: The third one?

Q: Right.

A: No, sir. I did not. (Inaudible)

Q: Let's let's let's go to – OK you said that you determined that this was a police matter, and you left.

A: Yes.

Q: You made the decision to leave?

A: Yes.

Q: When you returned, what did you observe?

* * *

Exhibit 16

CCA COMPLAINT #03513

Q = Ken Glenn
QQ = David Moonitz
A = Tyrone Harrison
A = Joe Arnold

[p.1]

Today's date is May 12, 2004 at the office of the Citizens Complaint Authority. I'm investigator Ken Glenn, here with my partner David Moonitz. The time is approximately 9:20 a.m. We're here with Mr. Tyrone Harrison, a Cincinnati firefighter and his union representative Lt. Joe Arnold, the union president.

Q: Tyrone, I'd like to start off with, can you tell me how long you've been with the Cincinnati Fire Department and your current assignment?

A: I've been on the Fire Department for eighteen years. I am FAO driver on Engine 38.

Q: Okay, was that your assignment on November 30?

A: Yes.

QQ: What is a FAO?

A: It's an engineer, the one that drives the apparatus.

Q: Are you a paramedic or EMT with first aid training?

A: We're all EMT's in the Fire Department. I'm an EMT, but I'm not a paramedic. Okay, and can you describe your training cycle that you go through for you to become an EMT?

A: Uh, we have a certain amount of credit hours that we have to have, and, uh, the Fire Department initiates training for us. And throughout the year, and then we have a class that we go through in order to get recertification for CPR and what-have-you. We do that on a regular basis.

Q: Okay. You say on a regular basis. How often is that?

* * *

[p.11]

A: I heard cars coming; I didn't see anything after that. I was on the apparatus. I didn't see a thing. I didn't see - - I didn't know - - see the police cars after we left the scene and drove around the building, then I seen all the cars.

Q: Right.

A: Prior to that, I didn't see any - - heard them come by -- didn't see anything.

Q: You didn't get curious and say, 'Hey —

A: I've been on the Fire Department eighteen years, sir. I knew that when the police get on the scene with someone, it's how Miss Daniels and Mr. Jones acting? If something was going to come up, I didn't want to see it, because I knew this situation I'm in here now is going happen -- (laughs). I didn't want to be privy to it. I wanted to be out of it as much as possible. And so I got on my apparatus. I didn't want to hear; I didn't want to see. First time I seen all the incident is when it was on Channel 9 news.

QQ: Okay, you said you could hear more police arrive.

A: Yes, sir.

QQ: How?

A: Cars coming. You could hear them on the radio because my dispatch radio is saying that the police were asking for help on the scene and all that.

QQ: Okay, and then. Were they arriving with lights and sirens?

A: I couldn't recall. Like I said, I didn't see anything. I don't know. I know as we drove away, there were lights on.

QQ: How long after the initial arrival of the first officers to -- did your apparatus and your crew

remain there before you left – uh – and went back to the fire station?

* * *

APPENDIX F

Carl L. Parrott, Jr., M.D.
Hamilton County Coroner
The Frank P. Cleveland, M.D. Institute of Forensic Medicine, Toxicology and Criminalistics
3159 Eden Avenue, Cincinnati, Ohio 45219-2299
Office: 513-946-8700 Fax: 513-946-5727

For Immediate Release
12-03-03

The death of Nathaniel Jones during or immediately after a violent struggle with police officers attempting to subdue and arrest him was reported to and investigated by the Hamilton County Coroner's Office.

Autopsy findings disclosed a markedly obese man with markedly enlarged, hypertensive heart. The prior presence of hypertensive heart disease was confirmed through medical history.

There were superficial so-called "tram-track" bruises, consistent with nightstick injuries, confined to the lower part of the decedent's body, with no evidence of transmission of force or injury to deeper organs.

Toxicological testing performed on the decedent's blood revealed the confirmed presence of cocaine and phencyclidine, known as PCP or "angel dust". Quantitation of these substances revealed intoxicating

levels of each. Ingestion is believed to have occurred in the case of the cocaine three hours or less before death and in the case of phencyclidine five hours or less before death.

Toxicological testing also disclosed the presence of methanol. Methanol is a frequent constituent of embalming fluid, used in the preparation of "fry-sticks" or "wets", home-rolled or commercial cigarettes dipped in embalming fluid or another liquid chemical, occasionally spiked with PCP. Three such cigarettes containing PCP were recovered from the decedent's car, as was about one-third of a gram of powder cocaine.

Cocaine, in addition to its intoxicating effects, is a cardiac irritant and can by itself cause lethal abnormal heart rhythms or dysrhythmias. Chronic cocaine use can cause or contribute to heart disease of hypertensive type such as the decedent exhibited.

Mr. Jones suffered from a potentially lethal combination of health problems when he encountered and apparently assaulted police officers early last Sunday morning. His life expectancy would have inevitably been considerably reduced. However, the event that precipitate his death at that particular time rather than the following week, month, or year was the ensuing struggle.

Violent physical confrontations promote a physiological stress reaction, the so-called "fight or flight" response. In a person with Mr. Jones' underlying problems, such a reaction can be and frequently is lethal.

Accordingly, his death must be regarded as a direct and immediate consequence of the struggle, potentiated to his obesity, his heart disease, and his drug intoxication.

When issued by this Office, Mr. Jones' death certificate will list, as the immediate cause of death, cardiac dysrhythmia, due to physiological stress reaction, due to a violent physical struggle with restraint.

Contributing factors listed on the death certificate will be obesity, hypertensive heart disease, and intoxication by cocaine and phencyclidine.

The death of Mr. Jones should be understood as multifactorial. Absent any one of the contributing problems, Mr. Jones' odds of surviving the struggle would have been increased. Absent all of them, he would have been expected to survive. Indeed, absent the drug intoxication, the confrontation should not have occurred at all, since the police would not have been requested to respond.

Absent the struggle, however, Mr. Jones would not have died at that precise moment in time, and the struggle therefore is the primary cause of his death.

Ohio law specifies four valid manners of death in cases where a manner can be determined: accidental, homicidal, natural, and suicidal. Because Mr. Jones' death was a result in whole or, as in this case, in part of the purposeful act of another person or persons, specifically the attempt to subdue and arrest him by police, his death will be ruled a homicide. This word should not be interpreted as implying inappropriate

behavior or the use of excessive force by police. Whether or not that occurred is not within the scope of my training and experience, nor that of my staff. The word does not imply hostile or malign intent. It is merely a characterization of the circumstance in which the cause of death came to be.

I pray that we can look forward to the day when new technologies have been developed, tested, and approved for use in circumstance such as those in which Nathaniel Jones and six Cincinnati police officers found themselves last Sunday morning, technologies which will reduce the risk of death and injury, both to person being detained and those charged with detaining them.

Death Record
HAMILTON COUNTY CORONER'S OFFICE
Cincinnati, Ohio

Case No. CC03-03798
Case Type: Autopsy Case
Case Reported: 11/30/2003 Time Reported: 6:50 am

Reported By: Dr. Kevin Joseph
Agency: University Hospital
Reported To: Lucian Guy - Robert R. Pfalzgraf, M.D.

Name of Deceased: Nathaniel J. Jones
Age: 41 Birth Date: [REDACTED]/1962
Address Street &No.: 4 East Lakeview Drive
City/State: Cincinnati, Ohio Zip Code: 45237
SSN: [REDACTED]-2617

Occupation: Caretaker
Marital Status: Single Sex: Male Race: Black
Medical Care:
Medical At:
Found dead at:
Inured at: 64 West Michell Avenue, Cincinnati, Ohio 45217
Time: 5:55 am Date: 11/30/2003

Investigated by: Cincinnati Police, Homicide
Next of kin notified by: hospital Date: 11/30/2003
Pronounced dead by: Dr. Kevin Joseph, Emergency Room - University Hospital
Date: 11/30/2003 Time: 6:43 am
Postmortem examination by: Robert R. Pfalzgraf, M.D.

Body viewed by:_____ Date: 12/01/2003
Disposition of body: Cremation
Location: Southwest Crematory, Milford, Ohio
Funeral Director: J.C. Battle and Sons Funeral Home - 543 Rockdale Cincinnati, Ohio 45229

IMMEDIATE CAUSE OF DEATH

		Approximate Interval between Onset of Death
Due to (A)	Cardiac dysrhythmia	BRIEF
Due to (B)	Physiologic stress reaction with hypoxia	
Due to (C)	Violent struggle with restraint	
Due to (D)		

Part II. Other significant conditions contributing to death but not related to the terminal disease condition given in Part (A). Obesity, hypertensive heart disease, intoxication by cocaine and phencyclidine

fanner of Death:
Homicide
E975
402
968.5
968.3
980.1

Death Certificate Distribution:
Funeral Home
Date: 12/15/2003

/s/
Coroner of Hamilton County, Ohio

111

№. 08-521

Supreme Court, U.S.
FILED
NOV 19 2008
OFFICE OF THE CLERK

In The Supreme Court of the United States

GUY ABRAMS, ET AL.,
Petitioner,

v.

BESSIE JONES,
ADMINISTRATRIX OF THE ESTATE
OF NATHANIEL JEFFREY JONES,
Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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November, 2008

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STATEMENT OF THE CASE

Approximately four years ago, in September 2004, the estate of Nathaniel Jones sued the Cincinnati Police Department, Cincinnati Fire Department, individual Defendant Cincinnati Police Officers and the individual Cincinnati Firefighters in Federal Court. Mr. Jones' estate seeks damages to redress the violation of his Fourth Amendment right to be free from unreasonable seizure, and excessive force, his Fourteenth Amendment right to receive immediate and appropriate medical care for injuries inflicted by the Defendants, and not to be deprived of his life without due process, and state law claims including assault, battery, wrongful death and gross negligence.

On November 29, 2003, Mr. Jones had stopped to visit friends at a White Castle in Cincinnati, Ohio. Sometime between the morning hours of 3:00 and 5:30 on November 30, 2003, while visiting the White Castle restaurant, Mr. Jones became ill and needed medical attention. He lost consciousness and fell to the pavement in the White Castle's parking lot. A White Castle employee ran inside

and dialed 911 seeking emergency medical treatment for Mr. Jones.

Sometime later, the Cincinnati Fire Department responded to the request for medical services. The firefighters directed their attention to the employee who called 911 and had in her moment of deep concern for Mr. Jones begun to hyperventilate. At some point, Mr. Jones regained consciousness and entered White Castle. His close friend, a White Castle employee, noticed his condition, handed him a cup of water and directed the firefighters' attention to him. The firefighters refused to evaluate treat and/or care for Mr. Jones and told the female employee that they would not treat Mr. Jones but would call the Police Department.

Moments later, Mr. Jones, walking and dancing, exited the White Castle Restaurant. He continued in a like manner in the parking lot. At no time was Mr. Jones committing an unlawful act, nor was he causing damage to persons or property. At some point the firefighters contacted the Cincinnati Police. The firefighters never personally attempted to speak with Mr. Jones or to assess his

condition, and received no complaint about Mr. Jones' behavior from employees from White Castle, who called the firefighters to provide medical assistance. Nevertheless, the firefights described Mr. Jones as a nuisance.

When police officers began to arrive at the White Castle, P.O. Pike contacted dispatch and requested an MHRT (Mental Health Response Team) to respond to the scene, and also requested a supervisor with a tazer. P.O. Pike and Osterman approached Mr. Jones and unlawfully tried to subdue him rather than waiting for a MHRT or a supervisor with a tazer to respond. In fact, P.O. Pike made a decision that no MHRT was needed, and immediately approached Mr. Jones even though MHRT unit and a supervisor were in route.

P.O. Pike failed to maintain an appropriate reactionary gap. Mr. Jones was not presenting a danger to any person or property when P.O. Pike approached him, thus no officer should have approached within twenty-one feet of Mr. Jones. Had P.O. Pike maintained an appropriate reactionary gap, no assault would have occurred,

and neither Mr. Jones nor Defendants would have suffered any injury whatsoever.

Instead, P.O. Pike and Osterman began to savagely beat Mr. Jones with their PR-24s. P.O. Abrams, Slade, and Reese also arrived and began using their PR-24s on Mr. Jones as well. Mr. Jones was struck at least 33 times in quick succession. The officers never allowed him an opportunity to comply with verbal commands, to put his hands behind his back, or to be placed in a sitting position that would allow air to enter his lungs.

As Mr. Jones waved his hands in attempts to ward off the blows, the officers continued to strike him, even when he was on his hands and knees, unable to place his hands behind his back or to strike at the officers. At no time did the officers disengage or de-escalate as recommended by Cincinnati Police Department policy.

Several different officers sprayed chemical irritant in Mr. Jones' face even while the officers used the combined force of their bodies to press undue weight on the Mr. Jones' back restricting movement of Mr. Jones' diaphragm resulting in

lack of air exchange in his lungs. Other officers pressed Mr. Jones down to the ground as they handcuffed him. As the officers pressed their combined weight on Mr. Jones, and as Mr. Jones struggled to twist his body from under the crushing weight so that he could breathe, the officers exerted additional force, preventing Mr. Jones from getting any air, and putting further strain on Mr. Jones' heart. After sitting on Mr. Jones in this position, the officers stood up and walked around.

The officers ignored Mr. Jones and left him face down in handcuffs. They did not hear any gasps or sounds of breath coming from Mr. Jones, did not look to see if Mr. Jones was breathing, and took no action to ensure that he could breathe; they did not roll him over or immediately sit him up. P.O. Osterman did not look to see if Mr. Jones was breathing. Although he knew Mr. Jones was not breathing when Mr. Jones was rolled over, P.O. Osterman did not provide any respiratory support, mouth-to mouth or CPR. After brutally beating Mr. Jones and spraying him with chemical irritant, the officers left Mr. Jones laying face down on his stomach, hands cuffed behind his back on the asphalt pavement for a prolonged time, which

directly contributed to and caused Mr. Jones' death. When the officers noticed that Mr. Jones was not breathing, they stood around Mr. Jones and discussed the absence of Firefighters.

The officers' conduct was in direct violation of CPD policy and training which warns that after a struggle, "to move [the individual] to a seated position. Do not leave the person prone on the ground. Look for signs of troubled breathing – [g]asping, shallow breathing. . ." The CPD Staff Notes emphasize, "[a]s soon as possible get handcuffed person off their stomachs and into a seated or standing position."

Petitioners have yet to answer Mr. Jones' estate's complaint, filed more than four years ago. Instead, they filed a Motion to Dismiss in December 2004. In response, Mr. Jones' estate filed an amended complaint in January 2005 and in February 2005, filed a Motion for Leave to File a Second Amended Complaint which the Court granted in March 2005. In April 2005, Petitioners filed a Motion to Dismiss Mr. Jones' estate's Second Amended Complaint which the Court denied in part and granted in part in October 2006.

Petitioners appealed the denial of their Motion to Dismiss to the Sixth Circuit and the District Court stayed the case pending that decision.

In April 2008, the Sixth Circuit affirmed the decision of the District Court denying Petitioners' Motion to Dismiss. On April 14, 2008, Petitioners filed a petition for rehearing *en banc*. In June 2008, Mr. Jones' estate moved the District Court for leave to file a third amended complaint which the District Court granted. The same day, Petitioners filed a Motion for Reconsideration regarding the District Court's grant of leave to file an amended complaint. On June 17, 2008, the District Court granted Petitioner' Motion for Reconsideration and vacated its order granting the Motion to File a Third Amended Complaint. On July 31, 2008, the Sixth Circuit denied Petitioners' Petition for Rehearing and Defendant subsequently filed this petition for writ of certiorari.

SUMMARY OF THE ARGUMENT

The Petition for Writ of Certiorari should be denied. Petitioners' argument that Federal Rule of Civil Procedure 10(c) required the District Court

and the Sixth Circuit to accept the truth of Petitioners' self-exculpatory statements in resolving Petitioners' 12(b)(6) motion to dismiss is frivolous. Furthermore, Petitioners' assertion that the federal circuits are in conflict over Rule 10(c) is entirely without merit. None of the circuit decisions submitted by Petitioners reveals any conflict between the circuits regarding Rule 10(c).

Petitioners' assertion that the Sixth Circuit "disregarded" *Scott v. Harris* entirely lacks record support. Petitioners admit that they fully apprised the Sixth Circuit of this Court's decision in *Scott v. Harris*. To conclude that the Sixth Circuit disregarded *Scott v. Harris* solely because the Sixth Circuit affirmed the District Court's decision not to consider incomplete video tape evidence submitted by Petitioners with their 12(b)(6) motion is without merit.

Petitioners' assertion that there is conflict among the federal circuits as to whether the "deliberate indifference" standard applies to claims alleging a failure to provide medical care to detainees is also entirely without merit. In making this conclusion, Petitioners conflate principal with

application. None of the cases Petitioners have submitted in support of their assertion reveal the slightest conflict, as every decision regarding a failure to provide medical care to a detainee submitted by Petitioners deploys the deliberate indifference standard.

Petitioners have failed to provide any plausible reason why they should not be required to answer Respondents' allegations and discover the truth about Nathaniel Jones' death, after *more than four years* of litigation. The Petition for Writ of Certiorari should thus be denied.

ARGUMENT

I. RULE 10(c) JURISPRUDENCE IS CONSISTENT ACROSS THE FEDERAL CIRCUITS, AND PETITIONERS' ASSERTION THAT FEDERAL CIRCUITS ARE IN CONFLICT OVER RULE 10(c) FINDS NO SUPPORT IN THE CASE LAW TO WHICH PETITIONERS CITE.

Throughout the course of this litigation, commenced in *September of 2004*, Petitioners have

consistently avoided addressing head-on the allegations in Respondents' complaint. As the Sixth Circuit noted in affirming the District Court's order granting in part and denying in part Petitioners' Rule 12(b)(6) Motion to Dismiss, "[t]hroughout their briefs, defendants do not directly challenge the proposition that the facts alleged in the complaint state valid constitutional claims."[1] The present petition only amounts to further avoidance.

Petitioners' assertion that the Sixth Circuit "rewrote its own rule of civil procedure," in declining to accept as true self-exculpatory statements made by Petitioners during the course of an internal investigation into Nathaniel Jones' death, is entirely without merit and contrary to the very case law Petitioners proffer in support of their assertion. The frivolity of Petitioners' argument cannot be overstated. For example, in addressing an argument substantially identical to Petitioners', the Seventh Circuit opined:

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[1] App. 10a.

The state makes the fantastic argument that by appending the board's decision, with its recitation that Carroll had "refused" to appear before the board, to his complaint, Carroll vouched for the truth of the recitation and therefore pleaded himself out of court. According to the state, *all* facts contained in *any* attachments to a complaint "are [automatically] deemed facts alleged as part of [the] complaint." And so the "fact" that Carroll had refused to attend the board's meeting was a fact "stated in his complaint," and he could not amend his complaint in his brief; he could not contradict "his complaint's allegation that he refused to appear" before the board.

He had appended the board's decision not in order to vouch for the truth of the statements in it, but to show that he had exhausted his administrative remedies. Although a "copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes," Fed. R. Civ. P. 10(c), dismissal on the basis of facts in that instrument is proper only if the plaintiff

relies upon it "to form the basis for a claim or part of a claim," which of course, he was not doing here. The logic of the state's argument is that an appellant, required by the appellate rules to append to his brief the decision of the District Court or administrative agency that he is appealing, by doing so kills the appeal because appending amounts to vouching for the truth of the propositions in the appended decision.

The argument if accepted would do wonders for our workload, but is beyond nonsensical and unworthy of the office of the Attorney General of Illinois... These are unprofessional lapses. The state is ordered to show cause within 14 days why it should not be sanctioned for the frivolous argumentation in its brief.[2]

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[2] *Carroll v. Yates*, 362 F.3d 984, 986 (7th Cir. Ill. 2004) (internal case citations omitted).

Remarkably, Petitioners presently submit this Seventh Circuit opinion in support of their insistence that the Sixth Circuit has run amok.[3]

Yet, in declining to adopt Petitioners' interpretation of Rule 10(c), the Sixth Circuit similarly held:

> Even if we assume that a transcript of an interview constitutes a "written instrument," treating a transcript as part of a pleading does not mean that we assume everything the officers said in those interviews is true. Where a plaintiff attaches to the complaint a document containing unilateral statements made by a defendant, where a conflict exists between those statements and the plaintiff's allegations in the complaint, and where the attached document does not itself form the basis for the allegations, Rule 10(c) "does not require a plaintiff to adopt every word within the exhibits as true for purposes of pleading simply

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[3] Petition at 9, fn. 14.

> because the documents were attached to the complaint to support an alleged fact." Rather, we treat the exhibit as an allegation that the officers made the statements in the transcripts and we treat that allegation as true. Thus, we accept as true that on June 24, 2004 Officer Pike said that no officer put weight on Jones's back during the handcuffing process... We do not accept as true, however, that Officer Pike's statement is accurate or true; this is a question of credibility and weight of the evidence that is not before a court considering a motion to dismiss.[4]

The Sixth Circuit's elucidation of the applicable principle in Rule 10(c) hardly constitutes a "rewriting" of the rule. Rather, the principle applied by the Sixth Circuit has been consistently applied by other circuit courts addressing the issue whether attachment of an exhibit to a complaint

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[4] App. 11a (citing *N. Ind. Gun & Outdoor Shows, Inc. v. City of South Bend*, 163 F.3d 449, 454-56 (7th Cir. 1998).

necessarily renders true every statement contained in the exhibit upon dispositive motion.[5]

Petitioners' assertion that the federal circuits are in conflict over Rule 10(c) is false. None of the cases submitted by Petitioners in support of their assertion reveals the slightest inconsistency in Rule 10(c) jurisprudence. Rather, Petitioners conflate principle with application, in fallaciously concluding that the circuits must be in conflict over Rule 10(c) because some circuits in some cases have concluded that plaintiffs pled themselves out of court by attaching exhibits to their complaints.[6]

A. The Seventh Circuit.

Petitioners submit four Seventh Circuit cases in support of their assertion that the federal

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[5] *See Gant v. Willingford Bd. of Educ.*, 69 F.3d 669, 674 (2nd Cir. 1995) (plaintiff did not adopt superintendent's exculpatory statements by attaching superintendent's report to the complaint); *N. Ind. Gun & Outdoor Shows v. City of South Bend*, 163 F.3d 449, 452-454 (7th Cir. 1998); *Carroll v. Yates*, 362 F.3d 984 (7th Cir. 2004).

[6] Petition at 8-11.

circuits are in conflict over Rule 10(c),[7] *Thompson v. Illinois Dep't of Prf'l Regulation*,[8] *Riggins v. Walter*,[9] *Matter of Wade*,[10] and *Carroll v. Yates*.[11] Respondents have already demonstrated that *Carroll* involved an argument substantially identical to Petitioners', and that the Seventh Circuit applied Rule 10(c) just as the Sixth Circuit did in the present case. Petitioners' assertion that *Carroll* reveals conflict in the circuits and specifically between the Seventh and Sixth Circuits is without merit.

Thompson involved dismissal of the plaintiff's First Amendment retaliation claim where he alleged that he was demoted from his position as Chief Administrative Law Judge because of his political beliefs and associations.[12] The plaintiff

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[7] *Id.* at 9.

[8] 300 F.3d 750 (7th Cir. 2002).

[9] 279 F.3d 422 (7th Cir. 1995).

[10] 969 F.2d 241 (7th Cir. 1992).

[11] 362 F.3d 984 (7th Cir. 2004) (discussed *supra* at pg. 2-3).

[12] 300 F.3d 750, 753-755 (7th Cir. 2002).

attached to his complaint the Chief ALJ job description and the description of the job to which he was demoted, in alleging the adverse employment action element of his claim.[13] Accepting as true the description of the Chief ALJ position, alleged and affirmed by the plaintiff as a component of his demotion, the Court found that the Chief ALJ was a "policymaking official," and thus terminable at will for political reasons.[14] *Thompson* involved a job description alleged by the plaintiff as a core element of his retaliation claim. Petitioners' assertion that the Seventh Circuit applied a different rule in *Thompson* than the Sixth Circuit applied in the case at bar ignores the obvious difference between the two cases: in the case at bar, Respondents do not plead Petitioners' self-exculpatory statements as an element of their claims.[15] Petitioners' assertion that *Thompson* reveals conflict among the federal circuits over Rule 10(c) jurisprudence is thus without merit.

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[13] *Id.* at 754-755.

[14] *Id.* at 757-758.

[15] *Id.* at 754-755.

Riggins involved a prisoner's claim that a prison guard violated his due process rights by placing him in segregation to punish him, without a predeprivation hearing.[16] However, the prisoner attached to the complaint *his own statement* that he was segregated for the purpose of investigation and not punishment.[17] The Court accepted his own statement as true pursuant to Rule 10(c) and Rule 12(b)(6), as it was dispositive of a core element of his claim. Under the relevant state administrative law the prisoner was not due a predeprivation hearing if placed into segregation for the purpose of investigation.[18] *Riggins* involved accepting the plaintiff's own admission and not the self-exculpatory statement of his opponent, and does not evidence conflict among the federal circuits over Rule 10(c) jurisprudence as Petitioner presently asserts.

The Matter of Wade involved dismissal of the plaintiffs' claim that the government covered up its possession of certain documents requested by the

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[16] 279 F.3d 422, 425-426 (7th Cir. 1995).

[17] *Id.*

[18] *Id.*

plaintiffs pursuant to *FOIA*.[19] Specifically, the plaintiffs alleged that a government official made a transcribed admission. According to plaintiffs, he admitted he possessed documents of which the government denied possession when the plaintiffs made a *FOIA* request.[20] The plaintiffs attached the government's letter in response to their *FOIA* request to their complaint, and attached the alleged transcript of the government official's admission to their response to the motion to dismiss.[21] The letter in response to the *FOIA* request stated that the government was not in possession of the requested documents, and the alleged transcript did not include an admission of possession by the government official. As the official's admission was essential to the plaintiffs' coverup claim, and as the *FOIA* response letter and alleged transcript were attached to the plaintiffs' pleadings to establish the coverup, the Court construed the attachments as true on defendant's

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[19] 969 F.2d 241, 248-250 (7th Cir. 1992).

[20] *Id.* at 249-250, fn. 12.

[21] *Id.* at 250.

motion to dismiss.[22] The Seventh Circuit's decision to accept the truth of statements in documents the plaintiffs themselves alleged to establish a coverup reveals no inconsistency between the Sixth Circuit's decision in the present case and Rule 10(c) jurisprudence across the federal circuits. Rather, it reveals an application of Rule 10(c) to facts bearing no resemblance to those in the present case.

In *Wade*, the claim consisted solely of the allegation that an admission existed in the document submitted to the court. In *Wade*, that statement did not, in fact, exist. Here, Mr. Jones' estate in no way relies on any admission or denial of the officers involved to prove the claim. In asserting that *Wade* demonstrates the existence of a circuit split, Petitioners conflate Rule 10(c) with its application to diverse circumstances. The petition should thus be denied because Petitioners' assertion that cases from the Seventh Circuit reveal conflict between the federal circuits over Rule 10(c) is without merit.

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[22] *Id.*

B. The Third Circuit.

Petitioners assert that *ALA, Inc. v. CCAIR, Inc.*[23] "ruled differently than the Sixth Circuit in the case at bar."[24] Yet, in *ALA* the court *declined* to grant the defendant's 12(b)(6) motion to dismiss on defendant's affirmative Statute of Frauds defense.[25] The plaintiff attached to its complaint for breach of contract a written and signed memorialization of an oral agreement for the sale of securities, alleging that the document established the existence of a contract.[26] Defendant moved for 12(b)(6) dismissal, asserting that the memorialization attached to the complaint evidenced an agreement to negotiate rather than an enforceable contract under the Statute of Frauds, and that Rule 10(c) required the court to provide the attached memorialization controlling weight over the plaintiff's allegation of an

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[23] 29 F.3d 855 (3rd Cir. 1994).

[24] Petition at 10.

[25] 29 F.3d 855, 862 (3rd Cir. 1994).

[26] *Id.* at 857.

enforceable contract.[27] The court agreed that "[w]here there is disparity between a *written instrument* annexed to the pleading and an allegation in the pleading *based thereon* the written instrument will control," but vacated the lower court's order granting defendant's motion to dismiss, on other grounds.[28] Petitioners' assertion that the *ALA* court's ruling is "different" than the Sixth Circuit's ruling is without import, as the allegations in the case at bar are neither based upon a written instrument alleged to evidence an enforceable contract nor the self-exculpatory statements made by Petitioners during the course of the internal investigation into Nathaniel Jones' death. Petitioners' assertion that *ALA* reveals conflict between this circuit and the Third Circuit over Rule 10(c) is entirely without merit and their petition should be denied.

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[27] *Id.* at 860-861.

[28] *Id.* at fn. 8, 859.

C. The Fourth Circuit.

Petitioners' assertion that *Demetry v. Lasko Prods., Inc.*[29] reveals conflict between the circuits over Rule 10(c) is likewise misplaced.[30] *Demetry* involved dismissal of the plaintiff's claim that the defendant deceptively sold defective fans that caused fires.[31] The plaintiff attached to his complaint a voluntary recall notice issued by defendant that established the defendant's affirmative defense.[32] The court applied Rule 10(c), and the fact that the defendant issued the voluntary recall notice was dispositive of the plaintiff's claims.[33] Petitioners' implication that *Demetry* is inconsistent with the present case is entirely without merit. The petition should be denied.

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[29] 2008 U.S. App. LEXIS 17458,*1 (4th Cir. 2008).

[30] Petition at 10.

[31] 2008 U.S. App. LEXIS 17458*, *1 (4th Cir. 2008).

[32] *Id.* at *1-*2, *4.

[33] *Id.*

D. The Fifth Circuit.

Petitioners assert that *Associated Builders, Inc. v. Alabama Power Co.*,[34] further reveals conflict between the circuits over Rule 10(c).[35] *Associated Builders* involved dismissal of the plaintiff's *sole claim* that a bond prospectus was misleading because it omitted that the bonds could be redeemed without premium prior to a certain date, under certain circumstances.[36] The plaintiff attached the prospectus to its complaint to evidence its sole allegation that the information was omitted.[37] Yet, the prospectus actually did include the information that the plaintiffs alleged to be omitted.[38] So, the court dismissed the plaintiff's sole claim that omission of the information rendered the prospectus misleading.[39]

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[34] 505 F.2d 97 (5th Cir. 1974).

[35] Petition at 10.

[36] 505 F.2d 97, 99 (5th Cir. 1974).

[37] *Id.*

[38] *Id.* at 100-101.

[39] *Id.* at 102.

Like the issue in *Wade*, the plaintiff's only claim relied solely on the allegation that the attached document did not include information which it did, in fact, include. Again, the claims brought by Mr. Jones' estate in no way rely on the admissions or denials included in the documents attached to his complaint. Petitioners' assertion that this ruling reveals a conflict between the circuits over Rule 10(c) is without merit. Petitioners' intimation that Respondents' claims should similarly be disposed of based on Petitioners' self-exculpatory statements strains credibility and their petition should be denied.

E. The Ninth Circuit.

Petitioners cannot point to *Coos County Bd. Of County Comm'rs v. Kepthorne,*[40] as a demonstration of further conflict between the circuits over Rule 10(c).[41] *Coos* involved dismissal of the plaintiff's claim that the defendant failed to perform a nondiscretionary act or duty by failing to remove a

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[40] 531 F.3d 792 (9th Cir. 2008).

[41] Petition at 10-11.

species from the endangered species list.[42] The plaintiff alleged that the defendants had a duty to remove the species from the list because, the plaintiff alleged, the U.S. Fish and Wildife Service concluded that the species should be removed from the list in a report.[43] The plaintiff attached a copy of the report to its complaint. Yet, the report did not conclude that the species should be removed from the endangered species list, but rather concluded the opposite.[44] The Ninth Circuit affirmed dismissal of the plaintiff's complaint, as the alleged statement in the report constituted the only conceivable allegation that defendants had a duty to remove the species from the list.[45] Petitioners' assertion that this ruling is in conflict with the Sixth Circuit's Rule 10(c) jurisprudence is without merit. In the case at bar, Respondents' claims do not reduce to Petitioners' admissions, to which Respondent's cited in their complaint. Nor do Respondent's claims rest upon Petitioners' self-

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[42] 531 F.3d 792, 810-811 (9th Cir. 2008).

[43] *Id.*

[44] *Id.*

[45] *Id.* at 811-812

exculpatory statements, to which Respondents did not cite. Petitioners' assertion that *Coos* reveals conflict between the circuits over Rule 10(c) is also entirely without merit. The petition should be denied.

F. The Eleventh Circuit.

Petitioners assert that *Jenkins v. Fernandez*[46] reveals conflict between the circuits over Rule 10(c).[47] Jenkins involved dismissal of the plaintiff's claim "that he paid $350 to CCI for incorporation for services he has not received."[48] The plaintiff failed to allege an enforceable contract, but attached an invoice and his credit report to the complaint to establish that he made a credit card payment to the defendant.[49] Yet, the credit card number on the invoice did not match any of the accounts on Plaintiff's credit report.[50] Applying

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[46] 147 Fed. Appx. 107 (11th Cir. 2005).

[47] Petition at 10-11.

[48] 147 Fed. Appx. 107, 108 (11th Cir. 2005).

[49] *Id.* at 109, fn. 1

[50] *Id.*

Rule 10(c), the court concluded that it was not improper for the District Court to consider the documents attached by the plaintiff in ascertaining whether the plaintiff had stated a claim, and upheld the lower court's dismissal of the plaintiff's complaint as frivolous.[51] Petitioners' suggestion that *Jenkins* reveals conflict among the circuits over Rule 10(c) is again without merit. Petitioners' implication that *Jenkins* involved allegations and pleadings comparable to the present case and/or that their self-exculpatory statements should constitute allegations just as the plaintiff's invoice and credit report constituted allegations in *Jenkins* is entirely without merit. The petition should be denied.

G. The D.C. Circuit.

Finally, Petitioners assert that *Peoples Natural Gas Co. v. Fed. Power Comm'n*[52] further reveals conflict between the circuits over Rule 10(c).[53]

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[51] *Id.*

[52] 127 F.2d 153 (D.C. Cir. 1942).

[53] Petition at 11.

Peoples involved the defendant's opposition to the plaintiff's motion to compel the production of documents and records to ascertain the fairness of the defendant's pricing.[54] The District Court ordered production of the documents and records despite the defendant's averment that the plaintiff failed to allege that defendant was engaged in interstate commerce and thus subject to the plaintiff's jurisdiction.[55] Yet, the plaintiff had attached to its pleading a copy of a letter from plaintiff to plaintiff's counsel ordering the litigation and stating that the defendant was engaged in the transfer of natural gas from Pennsylvania to the State of New York.[56] The D.C. Circuit upheld the District Court's application of Rule 10(c) accepting the plaintiff's allegations contained in the plaintiff's letter attached to the complaint as adequately pleading that the defendant was engaged in interstate commerce.[57] Again, Petitioners' assertion that this case reveals conflict

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[54] 127 F.2d 153, 155 (D.C. Cir. 1942).

[55] *Id.*

[56] *Id.* 155-156

[57] *Id.*

between the circuits over Rule 10(c) strains credibility. Petitioners' implication that *Peoples* present circumstances similar to those in the present case is without merit. The petition for writ should be denied.

The cases submitted by Petitioners to establish conflict between the circuits over Rule 10(c) reveal no such conflict. Rather, the cases only reveal the myriad diverse circumstances under which Rule 10(c) may apply. Petitioners' suggestion that the "for all purposes" language in Rule 10(c) should be read to subvert all other rules of pleading and the rules and case law governing dispositive motions is without precedent. Petitioners' argument that the Sixth Circuit should have construed Petitioners' self-exculpatory statements to constitute allegations vouched for by Respondents and deemed true for the purpose of Petitioners' 12(b)(6) motion has been deemed "fantastic," "unworthy," "beyond nonsensical," "unprofessional" and "frivolous," in a case Petitioners astonishingly submit in support of their petition.[58] To be clear, Respondents have not vouched for Petitioners' self-

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[58] *Carroll v. Yates*, 362 F.3d 984, 986 (7th Cir. Ill. 2004).

exculpatory statements in pleading their claims. Again, the petition should be denied because Petitioners' assertions to the contrary are entirely without merit.

II. THE RECORD IS DEVOID OF ANY SUPPORT FOR PETITIONERS' ASSERTION THAT THE SIXTH CIRCUIT DISREGARDED THIS COURT'S DECISION IN *SCOTT v. HARRIS*.

Without record support, Petitioners assert that the Sixth Circuit "disregarded this Court's decision in *Scott v. Harris*."[59] Yet, at the same time, Petitioners admit that "*Scott v. Harris* was presented fully to the Sixth Circuit."[60] The record is absolutely devoid of any indication that the Sixth Circuit "disregarded *Scott v. Harris*" merely because the Sixth Circuit reached a conclusion opposite of Petitioners' as to the value of the video evidence to Petitioners' Rule 12 (b)(6) motion.

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[59] 127 S. Ct. 1769 (2007); Petition at 11.

[60] Petition at 13.

Petitioners fail to provide any authority for their assertion that the District Court abused its discretion in declining to consider the video evidence in resolving Petitioners' Rule 12(b)(6) motion, when "while the video may accurately reflect a portion of the incident a reasonable dispute may still exist as to the entirety of the events alleged in the Complaint."[61]

The video evidence at issue in *Scott v. Harris* displayed the entirety of the automobile chase and collision at issue.[62] In contrast, the public record video in the present case does not display the relevant events and conduct in their entirety. Much of the conduct relevant to Respondents' claims and Petitioners' defenses was not captured by the camera of the late-arriving cruiser, remained out of frame or was concealed by visual obstructions, such as the cruiser's hood.

In short, Petitioners provide no authority conflicting Sixth Circuit's affirmation that "[w]here

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[61] App. at 25a.

[62] http://www.supremecourtus.gov/opinions/video/scott_v_harris.rmvb

the evidence captures only part of the incident and would provide a distorted view of the events at issue, as the district court concluded with respect to the videotape, we do not require a court to consider that evidence on a 12(b)(6) motion."[63] And Petitioners' wild assertions of "false lawyer-crafted allegations" are without record support.[64] Petitioners have failed to provide any plausible reason why they should not be required to answer Respondents' allegations and discover the truth about Nathaniel Jones' death, after *more than four years* of litigation. This Court should deny the Petition for Writ of Certiorari.

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[63] App. at 12a (internal citations omitted).

[64] Petition at 13, 14.

III. THE FEDERAL COURTS ARE NOT INCONSISTENT IN DEPLOYING THE SUBSTANTIVE DUE PROCESS STANDARD FOR A CLAIM OF FAILURE TO PROVIDE MEDICAL CARE.

Petitioners' assertion that the federal courts apply inconsistent substantive due process standards to claims alleging a failure to provide medical care to a detainee is entirely without merit and belied by every decision out of every circuit submitted by Petitioners to support their assertion.[65] Petitioners seem to want to assert that conflicting authority throughout the circuits demonstrates that "deliberate indifference" is inappropriate in such cases.[66] Yet, every circuit decision submitted by Petitioners employs the deliberate indifference standard to qualified immunity defenses to claims of failure to provide medical attention to detainees.[67]

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[65] Petition at 15-23.

[66] *Id.*

[67] *Mata v. Saiz*, 427 F.3d 745, 751 (11th Cir. 2005); *Lopez v. Smith*, 203 F.3d 1122, 1131 (9th Cir. 2000); *Lolli v. Orange County*, 351 F.3d 410, 419 (9th Cir. 2003); *Forbes v. Edgar*, 112 F.3d 262, 266 (7th Cir. 1997); *Gibson v. Weber*, 433 F.3d 642,

It appears Petitioners again conflate principal with application. There is no conflict between the federal circuits over whether the "deliberate indifference" standard applies to a qualified immunity defense to a failure to provide medical care to a detainee. This is demonstrated clearly by the case law to which Petitioners cite. Rather, the conclusion to be drawn from Petitioners' argument is the truism that

> the difficulty for all judges with qualified immunity has not been articulation of the rule, but rather the application of it. As Justice Holmes once said, "General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise."[68]

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646 (8th Cir. 2006); *Chapman v. Keltner*, 241 F.3d 842, 846 (7th Cir. 2001); *Woodall v. Foti*, 648 F.2d 268, 272 (5th Cir. 1981); *Martin v. Gentile*, 849 F.2d 863, 870-871 (4th Cir. 1988); *Rouse v. Plantier*, 182 F.3d 192, 197 (3rd Cir. 1999); *Alsina-Ortiz v. Laboy*, 400 F.3d 77, 82-83 (1st Cir. 2005).

[68] *Flatford v. City of Monroe*, 17 F.3d 162, 167 (6th Cir. 1994)

Yet such an observation does not offer substantive ground for Petitioners' Petition for Writ of Certiorari. As Petitioners have failed to demonstrate the slightest conflict between the circuits as to whether the deliberate indifference standard applies in cases such as the present case, the Petition for Writ of Certiorari is without merit and should be denied.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
DEC 1 - 2008
OFFICE OF THE CLERK

No. 08-521

In The
Supreme Court of the United States

GUY ABRAMS, JAMES PIKE, JOEHONNY REESE, JAY JOHNSTONE, BARON OSTERMAN, THOMAS SLADE, LEROY BRAZILE, JAMES WAITES, JEFFREY BATTISON, THOMAS STREICHER, ROBERT WRIGHT, AND VALERIE LEMMIE,
Petitioners,

v.

BESSIE JONES, ADMINISTRATRIX OF THE ESTATE OF NATHANIEL JEFFREY JONES, BESSIE JONES, NATHANIEL JONES, JR., AND TYRIQ A. HOLLEY,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONERS' REPLY BRIEF

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QUESTIONS PRESENTED

1) Whether the "for all purposes" mandate of Fed. R. Civ. P. 10(c) requires that federal courts accept as true the facts stated in exhibits to a complaint for purposes of evaluating a motion to dismiss.

2) Whether the rule of *Scott v. Harris*, 127 S. Ct. 1769 (2007) (requiring summary judgment reliance on incontrovertible facts established by a public record videotape) also applies to Rule 12(b)(6) motions to dismiss asserting public employees' qualified immunity defense.

3) Whether the substantive due process "malice and intent to harm" standard, rather than the "deliberate indifference" standard, governs judicial review of police officers' on-the-scene immediate reaction to a suspect's need for medical care.

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REPLY MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

The petitioners' statement of the case provides the facts as established in the exhibits attached by the respondents to their second amended complaint and used as the substantive basis for the complaint (and corroborated by other public record materials). The respondents' statement of the case ignores the allegations in the exhibits and instead relies solely on false lawyer-crafted allegations belied by the exhibits to the complaint (and the other public record materials). Even now before this Court, the respondents fictionalize what occurred on November 30, 2003, when the petitioners responded to a call for service and Nathaniel Jeffrey Jones ("Jones") attacked them.

REASONS FOR GRANTING THE WRIT

I. THE FEDERAL CIRCUITS HAVE ISSUED CONFLICTING INTERPRETATIONS OF RULE 10(c), FEDERAL RULES OF CIVIL PROCEDURE

The respondents try to diminish the significance of the lower courts' refusal to consider the substantive effect of the exhibits they attached to the complaint by falsely representing to this Court that the exhibits did not form the basis for their claims. Even a cursory review of the second amended complaint[1] proves that

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[1] App. 73a, *et seq.*

the respondents repeatedly relied on the exhibits to form the *substantive* basis for their claims.[2] The respondents substantively cited the exhibits approximately *30 times* in the complaint to form the basis for their claims. See attached exhibit to this reply memorandum identifying the many times the respondents substantively cited their attached exhibits in their second amended complaint. The other false lawyer-crafted allegations in the complaint are emphatically and conclusively belied by the exhibits the respondents cited and attached to the complaint. It is, therefore, again false for the respondents to now suggest to this Court that they did not *substantively* cite the exhibits about 30 times, but rather allegedly cited them for other reasons that they do not bother to specify.

The respondents, however, do concede that "some circuits in some cases have concluded that plaintiffs pled themselves out of court by attaching exhibits to their complaints."[3] Ignoring that other circuits interpret the "for all purposes" language of Rule 10 (c) as it should be interpreted and substantively rely on the exhibits when the pleader substantively relied on the exhibits, in the case at bar the Sixth Circuit differently construed Rule 10(c), limited the rule, and held: "[W]e treat the exhibit as an allegation that the officers *made* the statements in the transcripts and we treat *that* allegation as true."[4] Notwithstanding that the respondents repeatedly relied on the exhibits for

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[2] App. 112a, *et seq*.

[3] Response to Petition for a Writ of Certiorari, p. 15.

[4] App. 11a (emphasis added).

the substance of the information contained in the exhibits, the Court of Appeals instead held: "Thus, we accept as true that on June 24, 2004 Officer Pike *said* that no officer put weight on Jones's back during the handcuffing process . . . . We do not accept as true, however, that Officer Pike's statement *is* accurate or true."[5]

Therefore, there is no truth whatsoever to the respondents' retroactive assertion that they no longer rely upon the substance of the many exhibits they attached to their complaint. The disingenuous nature of the respondents' position, and their characterization of the petitioners' legitimate effort to assert their qualified immunity defense as "frivolity,"[6] is highlighted by the respondents' repeated mischaracterization of a Seventh Circuit case, *Carroll v. Yates*.[7] In that case, as required by judicial rules, the plaintiff attached an administrative decision to a complaint for the simple purpose of demonstrating that he had exhausted his administrative remedies. For that reason, the Seventh Circuit did not treat as true the propositions within the administrative order.

By contrast, the respondents were not required by judicial rule to attach the many exhibits to their complaint and they were not required to rely on the exhibits for the substance of their allegations if they had some other, good-faith basis upon which to plead.

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[5] *Id.* (emphasis added).

[6] Response to Petition for a Writ of Certiorari, p. 10.

[7] 362 F.3d 984, 986 (7th Cir. 2004); Response to Petition for a Writ of Certiorari, pp. 10-12, 15-16, 30.

However, the respondents did voluntarily attach the exhibits and they did use the exhibits for the substance of the allegations in the complaint. The reason this litigation is still pending is because the respondents' second amended complaint is demonstrably false and disproves itself, yet the respondents perpetuated that falseness before the trial court and the Sixth Circuit, and now even before this Court.

II. WITHOUT JUSTIFICATION, THE SIXTH CIRCUIT DISREGARDED THIS COURT'S DECISION IN *SCOTT V. HARRIS* AND IGNORED THE INCONTROVERTIBLE FACTS PRESENTED IN A PUBLIC RECORD VIDEOTAPE OF THE INCIDENT

The Sixth Circuit did not mention, discuss, or distinguish this Court's public record videotape decision in *Scott v. Harris*.[8] The respondents oversimplistically argue that since the Sixth Circuit did not mention *Scott v. Harris* then it is not possible to know whether the Sixth Circuit disregarded that decision. The trial court ruling, issued prior to *Scott v. Harris*, accepted without further review the unsubstantiated assertion of respondents' counsel that the public record videotape "would provide a distorted view of events at issue" and did not consider the facts in the videotape when evaluating the petitioners' qualified immunity defense. The Sixth Circuit ruling, issued after *Scott v. Harris*, accepted without further review the trial court's acceptance of respondents'

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[8] 127 S.Ct.1769 (2007).

counsel's unsubstantiated assertion that the videotape "would provide a distorted view of events at issue."

The false lawyer-crafted allegations in the complaint include, for example, "Officers Pike and Osterman began to savagely beat Plaintiff with their PR-24s"[9] and "As Defendant Police Officers pressed their combined weight on Plaintiff, and he struggled to twist his body from under the crushing weight so that he could breathe, the Defendant police officers exerted additional force, preventing Plaintiff from getting any air, and putting further strain on Plaintiff's heart. After several minutes of struggling and pressing their weight on Plaintiff, the Defendant Officers had Plaintiff face down on the ground . . . . Defendant Police Officers ignored Plaintiff and left him face down in handcuffs while they sought to regain their breath . . . . Defendant Officers did not look to see if Plaintiff was breathing, and took no action to ensure that he could breathe . . . ." These false allegations are belied by the exhibits the respondents cited in their complaint and attached to the complaint. The false allegations are also belied by the public record videotape ignored by the lower courts.

It is unfair and unjust to override police officers' entitlement to qualified immunity from suit by ignoring incontrovertible facts in a public record videotape for no reason other than opposing counsel's unsubstantiated assertion that the videotape "would provide a distorted view of events at issue."

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[9] App. 89a-90a.

III. THE FEDERAL COURTS HAVE ISSUED INCONSISTENT RULINGS ON THE PROPER SUBSTANTIVE DUE PROCESS STANDARD FOR A CLAIM OF FAILURE TO PROVIDE IMMEDIATE MEDICAL CARE TO AN ARRESTEE AT THE SCENE OF AN ARREST

As the *en banc* Eighth Circuit held (prior to the Sixth Circuit's application of the *deliberate indifference* standard in the case at bar), "every circuit to consider the issue has applied the [*County of Sacramento v.*] *Lewis intent-to-harm* standard to 'those myriad situations involving law enforcement and government workers deployed in emergency situations.'"[10] The medical care allegations in the complaint arose in a situation involving police officers deployed in an emergency situation. If those officers are to be considered potentially liable for committing a constitutional tort subject to substantive due process requirements, that liability should only exist if the officers acted with malice and intent to harm.

By contrast, the Sixth Circuit disregarded that the petitioners had virtually no time and information with which to deliberate and choose between competing alternatives. Evaluating the immediate medical care needs for an arrestee at the scene of an arrest is substantively very different than evaluating the medical care needs of an individual incarcerated in a facility. The rationale for applying the deliberate indifference standard when time and information are adequate to reflect and make unhurried judgments is

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[10] *Terrell, et al. v. Larson, et al.*, 396 F.3d 975, 979 (8th Cir. *en banc* 2005) (emphasis added).

eliminated in an emergency situation, like the case at bar, where officers on the scene have to make immediate decisions based on incomplete information. Under those circumstances, malice and intent to harm is the appropriate substantive due process standard and fairly balances the respective rights and obligations of responding police officers and arrestees needing immediate medical care.

IV. CONCLUSION

Each petitioner was erroneously denied his qualified immunity defense. Contrary to the requirements of Rule 10 (c) Fed. R. Civ. P., the lower courts ignored exhibits attached to the complaint. Disregarding the rule of *Scott v. Harris*, the lower courts ignored the facts established in a public record videotape. Furthermore, the lower courts did not apply the "malice and intent to harm" substantive due process standard to the respondents' claim that the petitioners unconstitutionally failed to provide medical care even though they were involved in an emergency situation.

For the foregoing reasons, this Court should grant the police officers' petition for writ of certiorari and provide the officers their qualified immunity defense.

Respectfully submitted,

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APPENDIX

APPENDIX 1

- Pike Interview Ex.1 paragraph 37 page 89a
- Pike Interview Ex. 1, Osterman Interview Ex. 2, Slade Interview Ex. 3, Abrams Interview, Ex. 4, Reese Interview Ex. 5, CPD Policy 12.545 Ex. 6 paragraph 39 page 90a
- Slade Interview Ex. 3 page 91a
- Osterman Interview Ex.2 paragraph 44 page 90a
- Osterman Interview Ex.2 paragraph 47 page 92a
- Pike Interview Ex 1 paragraph 48 page 93a
- Abrams Interview Ex.4 paragraph 49 page 93a
- Slade interview Ex.3 paragraph 50 page 93a
- Johnstone Interview. Ex. 8 paragraph 51 page 93a
- Reese Interview Ex. 5 paragraph 52 page 93a
- Waite Intervew Ex. 9 paragraph 53 page 94a
- Waite Interview Ex. 9 paragraph 54 page 94a
- Reese Interview Ex. 5 paragraph 63 page 98a
- Pike Interview Ex.1 paragraph 64 page 98a
- Waite Interview Ex. 3, Slade Interview Ex. 3 paragaph 64 pages 98-99a
- Battison Interview Ex. 11 paragraph 66 page 99a
- Brazile Interview Ex. 12 pargraph 67 page 99a
- Slade Interview Ex. 3, Abrams Interview Ex. 4, Battison Interview Ex. 11, Johnstone Interview Ex 8. Waite Interview Ex. 9 paragraph 84 page 105a
- Harrison Interview Ex. 16 paragraph 96 page 108a
- Adams Interview Ex. 15 paragraph 97, pages 108-109a
- Reese Interview Ex. 5 paragraph 87 page 106a
- Schulte Interview Ex. 14 paragraph 88 page 107a
- Harrison Interview. Ex. 16 paragraph 96 page 108a
- Adams Interview Ex. 15 paragraph 97 page 109a